Historical Work Time Issues

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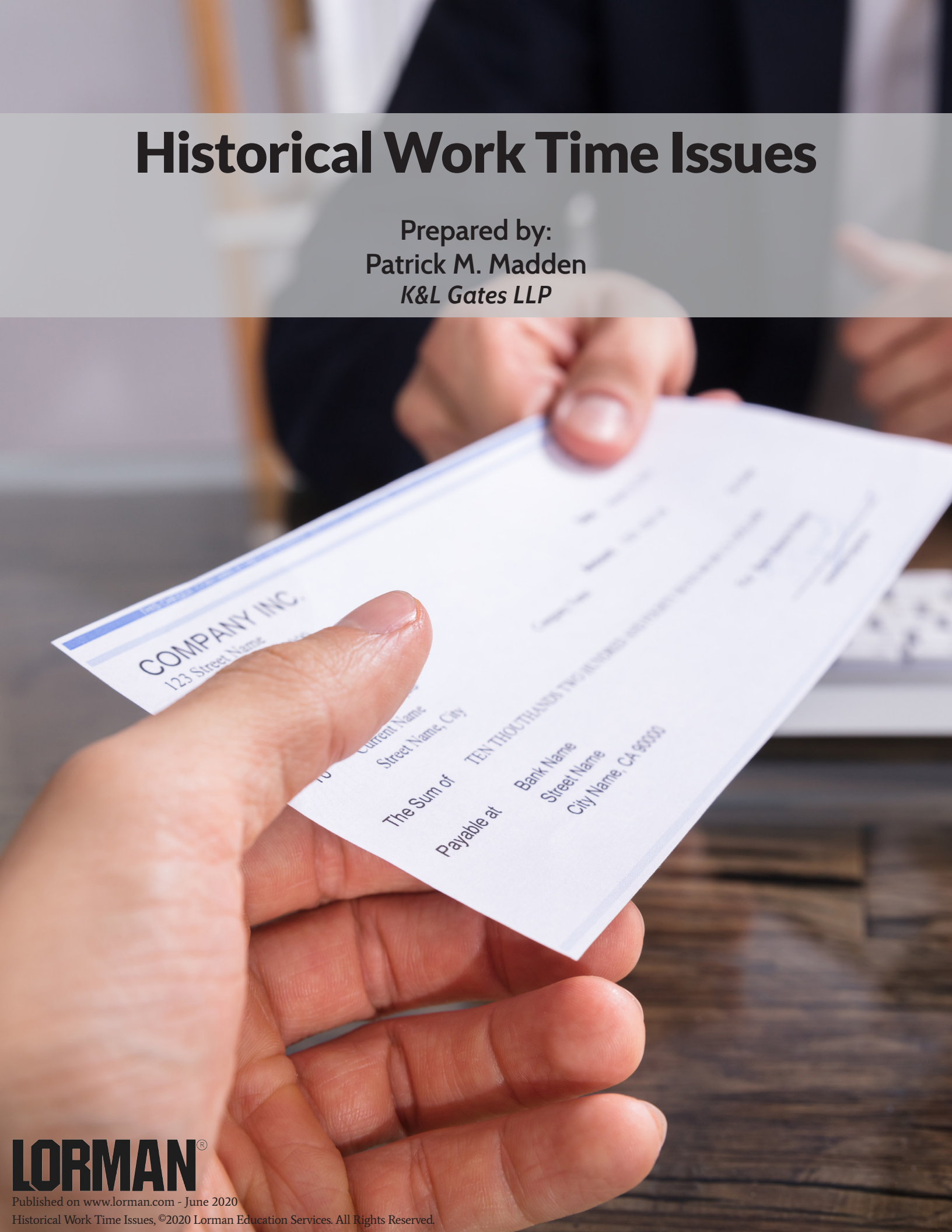

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Published on www.lorman.com - June 2020

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Historical Work Time Issues

Although the USDOL and the courts have provided general guidance as to what activities constitute work and when the activities must be compensated, the application of the general concepts is often difficult. The following sections discuss a number of areas where employers have historically struggled to comply with work time requirements.

A. Work at Home

Employees must be paid for all actions taken on behalf of their employers even if the activities take place at home. 29 CFR § 785.12. Such time could include time checking voicemail or emails; time developing a plan, schedule, or route for the day; time reading or completing required paperwork; or time loading or stocking equipment. *Cf. Karr v. City of Beaumont, Tex.*, 13 Lab. Case. (CCH) ¶ 33,511 (E.D. Tex. 1997) (employees who drive employer cars home have to be paid for all time spent cleaning and maintaining the vehicles). Whether such activities count as compensable work time depends on a number of factors.

First, the activities must be primarily for the benefit of the employer to count as hours worked. 29 CFR § 785.11; USDOL Opinion Letter FLSA2006-5 (March 3, 2006) (time employees voluntarily spend studying English language lesson materials outside of work is not compensable because such lessons primarily benefit employees). For instance, there is a difference between employees who are planning their day (including work) for their personal benefit and employees who are required to prepare detailed driving plans before they leave their homes. Similarly, an employee's mere presence at home is not likely to constitute work. *See Debraska v. City of Milwaukee*, 189 F.3d 650 (7th Cir. 1999) (policy requiring police officers on sick leave to remain at home unless they obtain permission to go elsewhere did not transform time at home into hours worked); USDOL Opinion Letter FLSA2002-10 (Nov. 1, 2002).

Second, the activities must be principal activities or integral and indispensable to principal activities in order to count as work. *E.g.*, USDOL Opinion Letter FLSA2009-15 (Jan. 15, 2009) (time at home completing "required reading and studying of materials" counts as hours worked); USDOL Opinion Letter FLSA2009-13 (Jan. 15, 2009) (time spent "outside of normal

working hours at their own home completing the required prerequisite classes" counts as hours worked). They could otherwise be disregarded as preliminary or postliminary time. *Cf. IBP*, 546 U.S. at 37. For example, the USDOL has recognized that clothes changing activities that occur at home do not count as work and are not compensable. The USDOL Field Operations Handbook § 31b13 (Sept. 19, 1996) explains:

> Employees who dress to go to work in the morning are not working while dressing even though the uniforms they put on at home are required to be used in the plant during working hours. Similarly, any changing which takes place at home at the end of the day would not be an integral part of the employees' employment and is not working time.

See Reich v. IBP, Inc., 38 F.3d 1123, 1126 n.1 (10th Cir. 1994) ("Requiring employees to show up at their workstations with such standard equipment is no different from having a baseball player show up in uniform, a businessperson with a suit and tie, or a judge with a robe. It is simply a prerequisite for the job, and is purely preliminary in nature.").

Third, even if activities at home could constitute work, such time is only compensable if the employer knew or should have known that an employee was engaged in such activities. *Forrester v. Roth's I.G.A. Foodliner, Inc.*, 646 F.2d 413, 414 (9th Cir. 1981) ("[W]here an employer has no knowledge that an employee is engaging in overtime work and that employee fails to notify the employer or deliberately prevents the employer from acquiring knowledge of the overtime work, the employer's failure to pay for the overtime hours is not a violation of [the FLSA]"); 29 CFR § 785.12. Thus, a key question is whether an employer should have reasonably anticipated that its employees would have to engage in such activities at home.

Finally, if the activities at home are limited, isolated, and sporadic, any time spent on such activities may fall within the *de minimis* doctrine. *See Reich*, 45 F.3d at 652-53; *Lindow* 738 F.2d at 1063.

B. Customer Location and Field Work

Employees must be paid for all actions taken on behalf of their employer regardless of the location where the activities actually take place. 29 CFR § 785.12. Thus, some employees are expected to perform activities in the field, at customer locations, or even at competitor locations. When such activities are an expected part of the job, the time performing the activities undoubtedly counts as hours worked. *E.g.*, *Malakhov v. Rogers & Cowan Inc.*, Case No. 2:11-cv-06605 (C.D. Cal. Oct. 23, 2012) (settling class action for unpaid overtime brought by public relations employees who were required to attend "fun cocktail parties and/or 'A-list' celebrity events that many would pay to go to"). Many activities, however, are less clear. For example, if an employee arrives at a customer location before the employee's scheduled start time to avoid traffic, so he or she can eat breakfast, or for his or her own convenience, the pre-shift time spent at the customer location may not be compensable. The same may be true if an employee mixes personal activities with alleged work activities, especially if the employee does not tell the employer about the activities. For example, a salesperson who "shops the competition" to see what approaches competing salespeople use, but who completes personal shopping while doing so. Of course, the extent (frequency and duration) of the activities will always be important.

The challenge in these circumstances is how best to assure that work time is fully and accurately documented. Systems must be in place so that employees can report the time, and policies must be in place to inform employees what should and should not be reported and to encourage accurate reporting.

C. Commuting and Travel Time

Under the Portal-to-Portal Act, 29 U.S.C. § 254(a) was intended to make time spent commuting between an employee's home and the workplace non-compensable. Thus, the USDOL adopted 29 CFR § 785.35, which states:

> 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. Normal travel from home to work is not worktime.

See Aiken, 190 F.3d at 758 ("The effect of these sections is to make ordinary commute time non-compensable under the FLSA."); *Reich*, 45 F.3d at 650 ("Commuting and similar activities are generally not compensable.").

Federal courts that have considered commuting time claims have emphasized that employees advancing such claims face a heavy burden of proof. *Adams v. United States*, 471 F.3d 1321, 1326 (Fed. Cir. 2006). Thus, the general rule that commuting time is not compensable holds true even though employees:

- Spend hours each day commuting between their homes and their job sites. *E.g., Smith v. Aztec Well Servicing Co.*, 462 F.3d 1274, 1286 n.3 (10th Cir. 2006) (commute time that lasted as long as seven hours each day not compensable under the FLSA); *Kavanagh v. Grand Union Co.*, 192 F.3d 269, 271-73 (2d Cir. 1999) (mechanic who commuted an average of seven to eight hours per day was not engaged in compensable work).
- Transport equipment from their homes to their job sites. *E.g., Adams*, 471 F.3d at 1327; *Dooley v. Mutual Ins. Co.*, 307 F. Supp. 2d 234, 246-47 (D. Mass. 2004);
- Travel to different job sites each day. 29 CFR § 785.35 (commute not compensable "whether [employee] works at a fixed location or at different job sites"); *e.g., Kavanagh*, 192 F.3d at 271 (mechanic traveled to more than 50 stores throughout New York and Connecticut); *Imada v. City of Hercules, Cal.*, 138 F.3d 1294 (9th Cir. 1998).
- Travel with other employees to get to and from work. *E.g., Smith*, 462 F.3d at 1291 (drilling rig employees who were encouraged or required to commute together).
- Discuss work-related issues during their commute. *E.g., Smith*, 462 F.3d at 1291.
- Travel to and from work on company buses. *E.g.*, 29 CFR § 790.7(f); *Bonilla v. Baker Concrete Constr., Inc.*, 487 F.3d 1340, 1343 (11th Cir. 2007) (construction workers who were "required to ride authorized transportation after the security gate" at an airport construction project were not engaged in work); *Vega v. Gasper*, 36 F.3d 417 (5th Cir. 1994) (farm workers who took company buses to the fields were not engaged in work); *see also Levias v. Pacific Maritime Ass'n*, 760 F.Supp.2d 1036 (W.D. Wash. 2011)

(longshoremen who traveled from dispatch hall were not engaged in work).

As the court in *Bolick v. Brevard County Sheriff's Dep't*, 937 F. Supp. 1560, 1565 (M.D. Fla. 1996), held: "[E]mployees should not be compensated for doing what they would have to do anyway – getting themselves to work."

Because employees started to assert claims for time spent commuting in company cars, in 1996, Congress amended the Portal-to-Portal Act to add the following language:

> For purposes of this subsection, the use of an employer's vehicle for travel by an employee and activities performed by an employee which are incidental to the use of such vehicle for commuting shall not be considered part of the employee's principal activities if 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); Employee Commuting Flexibility Act of 1996 ("ECF Act"), § 2102 of Pub.L. 104-188, 110 Stat. 1755, 1928 (1996). This amendment made clear that commuting in a company-owned vehicle is not compensable work time unless employees are required to "perform additional legally cognizable work while driving to their workplace in order to compel compensation for the time spent driving." *Adams*, 471 F.3d at 1325. Thus, as with commuting time in personal vehicles, federal courts have rejected claims for time spent commuting in an employer-provided car, even when employees travel to different work locations, talk about work, or transport equipment. *E.g., Kerr v. Sturtz Finishes, Inc.*, 2010 U.S. Dist. LEXIS 81782 (W.D. Wash. 2010) (painter's travel time transporting equipment was not compensable because the equipment did not transform the nature of his commute); *Adams*, 471 F.3d at 1327 (travel time in government-issued vehicles was not compensable even though the officers were required to carry their weapons, transport law enforcement equipment, and monitor the vehicles' communication equipment); *Bobo v. United States*, 136 F.3d 1465, 1467 (Fed. Cir. 1998) (travel time in government-issued vehicle was not compensable even though plaintiffs monitored their radios, were on the lookout for suspicious activity, refrained from personal errands or detours, and stopped to walk their dogs); *see also* USDOL Field Operations Handbook §§ 31c01 & 31c02 (March 6, 1981); *id.* § 31c10 (May 22, 1995). In fact, the ECF Act expressly provides that

activities "incidental" to use of a company vehicle for commuting are not principal activities that count as hours worked. *E.g.*, *Buzek v. Pepsi Bottling Group, Inc.*, 501 F. Supp. 2d 876, 886 (S.D. Tex. 2007) ("end-of-day reports and transportation of tools are activities incidental to his use of a company vehicle for commuting" and, thus, "[t]ime spent on these activities . . . is . . . not compensable under the FLSA").

In light of all this guidance, a number of courts have rejected attempts to count normal commute time as hours worked because the commute falls within the continuous workday. *E.g.*, *Kuebel*, slip op. at 13 ("The fact that Kuebel performs some administrative tasks at home, on his own schedule, does not make his commute time compensable any more than it makes his sleep time or his dinner time compensable."); *Rutti v. Lojack Corp.*, 596 F.3d 1046, 1050 (9th Cir. 2010) (technician's evening commute was not compensable even though he uploaded data after he returned home).

D. On-Call Time

Employees who are required to remain on call on their employer's premises or so close to the premises that they cannot use the on-call time effectively for their own purposes are engaged in compensable work. 29 CFR § 785.17. Employees who must merely leave word as to how they can be reached and who may engage in personal activities are not considered to be working while on call. The general test to determine whether an employee's on-call time constitutes working time is whether the time is spent predominately for the employer's benefit or for the employee's. *Armour & Co. v. Wantock*, 323 U.S. 126 (1944). At a minimum, employers must pay on-call employees for all time during which they are actually responding to calls. *Rutlin v. Prime Succession, Inc.*, 220 F.3d 737 (6th Cir. 2000); USDOL Opinion Letter FLSA2018-1 (Jan. 5, 2018); USDOL Opinion Letter FLSA2009-17 (Jan. 16, 2009). Moreover, if employees are interrupted too often during an on-call period, the entire period may count as hours worked. *See Pabst v. Oklahoma Gas & Elec. Co.*, 228 F.3d 1128 (10th Cir. 2000) (4 to 5 calls per day converted on-call time into work hours). *But see Rutlin v. Prime Succession, Inc.*, 220 F.3d 737 (6th Cir. 2000) (10-20 calls per day did not convert on-call time into work hours).

The first major question in relation to on-call time arises when an employer attempts to limit the types of activities in which an employee may engage during the on-call period. For instance, an employer may wish to prohibit employees from using alcohol or drugs during on-call time. Such limitations, if reasonable, should not transform on-call time into compensable work time because employees are still left with a range of personal activities in which they can engage. *E.g., Andrews v. Town of Skiatook, Okla.*, 123 F.3d 1327 (10th Cir. 1997); USDOL Opinion Letter FLSA2018-1 (Jan. 5, 2018); USDOL Opinion Letter FLSA2008-14NA (Dec. 18, 2008).

Another issue that was highlighted in two USDOL opinion letters is whether employees who are required to carry pagers must be paid for all time that they are subject to paging. USDOL Wage & Hour Opinion Letter Nos. 1793 & 1794. Because employees would be free to engage in personal activities while carrying pagers, they probably do not need to be paid for all times that they are carrying pagers. *E.g.*, *Ruffin v. MotorCity Casino*, 775 F.3d 807, 812-13 (6th Cir. 2015) (merely carrying a radio does not convert meal period into compensable time). The USDOL has never directly addressed this issue, but it issued an opinion letter in 2018 finding that on-call time was non-compensable when the employee was carrying a pager. USDOL Opinion Letter FLSA2018-1 (Jan. 5, 2018). Employees who carry pagers must certainly be compensated for all time during which they are responding to pages. Moreover, if they are interrupted so often that their free time cannot be effectively used for personal activities then compensation may be required. *Cf. Renfro v. City of Emporia, Kan.*, 948 F.2d 1529 (10th Cir. 1991); USDOL Opinion Letter FLSA2009-7 (Jan. 14, 2009) (withdrawn).