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EMPLOYMENT LAW

Employees Must Be Paid for Short Workday Breaks, Court Finds

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Special to the Legal

You may be reading this article on a “break” during your workday. To the extent that you are paid by the hour (and not just billing by the hour), the Fair Labor Standards Act and its regulations govern whether you are to be paid for that break. In *Perez v. American Future Systems*, No. 12-6171 (Dec. 16, 2015) (Restrepo, J), the court found that an employer must always pay employees for breaks of 20 minutes or less under the act.

TIME OFF THE COMPUTER IS UNPAID

Progressive Business Publications creates and sells business information publications. Its sales representatives work at call centers in Pennsylvania, Ohio and New Jersey, according to the opinion. The sales representatives, working at the call centers, log on to Progressive’s computer system upon arrival at work and, throughout the day, make outbound sales



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calls, document the results of the calls and perform various other tasks at Progressive’s direction. The company’s policy is to pay sales representatives “only ... for the time that they are logged into the timekeeping system,” the opinion said.

In or around June 2009, the Department of Labor began investigating Progressive’s break policy, according to the opinion. The next month, Progressive implemented a policy whereby “representatives may take personal breaks at any time for any

reason. Personal break time is not paid because it is a disadvantage to the representative to do so.” As such, it was the company’s policy that any time a sales representative was not directly and actively engaged in work for the

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company (for example, if the representative used the restroom or got a cup of coffee), he or she was required to log off of the computer system, which would result in the representative being “off the clock” and his or her time would not be paid.

DEPARTMENT OF LABOR FILES SUIT

The secretary of Labor brought suit against Progressive for violations of the FLSA in November 2012. Specifically, the suit alleged that

because Progressive's sales representatives were not being compensated for breaks of 20 minutes or less, they were being paid below minimum wage.

After extensive discovery, the parties filed cross-motions for summary judgment.

BREAKS ARE 'REST,' NOT 'OFF DUTY'

The principal dispute centered on which section of the DOL's regulations applied to Progressive's break policy. Progressive argued that 29 C.F.R. Section 785.16, relating to periods when employees are "off duty," governed the break policy. Specifically, because Progressive allowed employees "to take as many breaks as they want for as long as they want," the unlimited (but unpaid) breaks were 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." Under Section 785.16, this time is not characterized as "hours worked."

The DOL argued, in contrast, that 29 C.F.R. Section 785.18, governing "rest" periods, applied to the Progressive employees. Specifically, Section 785.18 provides that "rest periods of short duration, running from five minutes to about 20 minutes, are common in industry. They promote the efficiency of the employee and are customarily paid for as working time. They must be counted as hours worked."

The court found that Progressive's efforts to transform a specific situation—a break of 20 minutes or less—into the more general "off duty" situation was "unavailing." The court, therefore,

found that the "rest" period regulation (Section 785.18) applied and "should be enforced on a bright-line basis to govern the compensability of short day work rest periods of 20 minutes or less taken by Progressive employees." The court noted that the text of the "rest period" regulation has been unchanged since it was implemented in 1961 and has been reiterated numerous times since then. "By ensuring that employees do not have their wages withheld when they take short breaks of 20 minutes or less to visit the bathroom, stretch their legs, get a cup of coffee, or simply clear their head after a difficult stretch of work, the regulation undoubtedly protects employee health and general well-being by not dissuading employees from taking such breaks when they are needed." Because the regulation governs any type of 20-minute-or-less activity, it "should be applied as a bright-line rule." That is, any break of 20 minutes or less, for any reason, should be paid as hours worked.

INDIVIDUAL LIABILITY FOR OWNER

The court further found Progressive's president and CEO, Edward Satell, to be individually liable under the FLSA because he retained "final authority for the telemarketer compensation policies, the telemarketer break policy and ... he [retained] the final authority with respect to ... hiring and firing decisions on a policy level."

LIQUIDATED DAMAGES AWARDED

Finally, Progressive argued that liquidated damages should not be

awarded because it had acted "in good faith and had reasonable grounds for believing that it was not violating the FLSA." To support this argument, Progressive noted that it had sought and obtained the "advice of legal counsel" prior to implementing the policy in question. However, the company refused to disclose the "advice" upon which it relied. The court, therefore, awarded liquidated damages, finding that "where such a legal opinion has been sought and obtained ... this court is of the opinion that a defendant cannot demonstrate that it has acted in good faith unless it comes forward with at least some evidence that it acted in conformance with that (or, at the very least, that it has contravened the legal advice)."

The plain takeaway of the opinion is that hourly employees are to be paid for breaks of 20 minutes or less under the FLSA. The secondary takeaway relates to the advice of counsel in such matters. As the court noted, it would be an absurd result to reward a company for requesting the advice of counsel and then (potentially) ignoring such advice while seeking "credit" for simply asking the question. •