

EVERYONE CAN COUNT TO 40

Compensable Time

know what gets counted as paid time

By Christopher Scott D'Angelo

The U.S. Department of Labor (DOL) recently announced that it reached a settlement and the entry of a Consent Order with a Long Island masonry contractor for the contractor to pay \$500,000 in back overtime pay and damages to 69 employees after being sued by the DOL's Wage and Hour Division in June 2019. The division had alleged that "its investigation determined that the contractor and its owner failed to pay overtime to employees who worked more than 40 hours in a week, violating federal overtime and recordkeeping requirements. The lawsuit also says the employees were paid in cash or combinations of cash and checks, and the company failed to keep accurate records of employees' work hours and regular hourly pay rates." The DOL's lawsuit asserted that the contractor failed to pay overtime to masons and laborers from August 2015 to at least August 2018 in violation of the Fair Labor Standards Act (FLSA).

In response to the DOL's lawsuit, the contractor, which does commercial and residential masonry work and lays foundations, denied the allegations and said the company acted in good faith and complied with the law, and that the DOL's claims were barred by other laws and the contractor's assertion that

the DOL had denied the contractor due process rights at the closing conference.

THE OUTCOME

As a result of a settlement agreement filed with the U.S. District Court for the Eastern District of New York on April 30, 2021, a consent judgment was entered by that court that orders the contractor to pay workers \$250,000 in back overtime wages and another \$250,000 in liquidated damages. As noted by the DOL, the consent judgment also prohibits the contractor from the following:

- Future violations of the overtime and recordkeeping requirements of the FLSA
- Taking retaliatory action against employees who exercise their FLSA rights
- Telling any of their employees not to speak with the DOL investigators or telling their employees to provide untruthful information to them
- Soliciting or accepting the return or kick-back of the wages and damages from the affected employees
- Threatening or implying adverse action against any employees or former employees because of their receipt of funds due under the judgment or the FLSA

- Otherwise obstructing or interfering with any department investigative activities
- The judgment also orders the defendants to post at their storage yard a notice, in English and Spanish, of employees' rights under the FLSA

This is serious—and expensive—stuff. The FLSA establishes minimum wage, overtime pay, recordkeeping, and youth employment standards affecting employees in the private sector and in federal, state, and local governments. Covered nonexempt workers are entitled to a minimum wage set by law and to overtime pay at a rate not less than one and one-half times the regular rate of pay after 40 hours of work in a workweek. In cases where an employee is subject to both state and federal minimum wage laws, the employee is entitled to the higher minimum wage.

FLSA OVERTIME

As stated by the DOL regarding FLSA overtime: "Covered nonexempt employees must receive overtime pay for hours worked over 40 per workweek (any fixed and regularly recurring period of 168 hours—seven consecutive 24-hour periods) at a rate not less than

one and one-half times the regular rate of pay. There is no limit on the number of hours employees 16 years or older may work in any workweek. The FLSA does not require overtime pay for work on weekends, holidays, or regular days of rest, unless overtime is worked on such days. ... hours worked ordinarily include all the time during which an employee is required to be on the employer's premises, on duty, or at a prescribed workplace."

WHAT GETS COUNTED

It is important to know what gets counted in the 40 hours or as "compensable time," as it can be more than starting at picking up the first tool and setting it down at what seems like the end of the day. Problems arise when employers fail to recognize and count certain hours worked as compensable hours. According to the DOL, "The workweek ordinarily includes all time during which an employee is necessarily

required to be on the employer's premises, on duty or at a prescribed workplace. 'Workday,' in general, means the period between the time on any particular day when such employee commences his/her 'principal activity' and the time on that day at which he/she ceases such principal activity or activities. The workday may therefore be longer than the employee's scheduled shift, hours, tour of duty, or production line time." Additional guidance can be found at www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs22.pdf

CLOSING THOUGHT

Likewise, work not requested but "suffered or permitted" to be performed is work time that must be paid for by the employer. For example, an employee may voluntarily continue to work at the end of the shift to finish an assigned task or to correct errors. The reason is immaterial. The hours are work time and are compensable. Whether "waiting

time" or "on-call time" is to be counted and compensated depends on several factors and the circumstances. Thus, it is imperative for the employer to consult with their counsel to determine what should or need not be counted. ■

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