



The GSH 60-Second Memo

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Getting Paid for Sleeping on the Job

by Stephen L. Knowles

Most of the time, employees are subject to discipline or even discharge for sleeping on the job. As explained below, however, sometimes sleeping on the job constitutes "work" under the Fair Labor Standards Act ("FLSA").

I. Concept of "Work" Broadly Defined

By way of background, Section 6 of the FLSA,^[1] requires covered employers to pay non-exempt employees a specified minimum wage. Section 7(a)^[2] requires covered employers to pay non-exempt employees time and one-half for hours worked over 40 in a single workweek. Depending on the particular fact situation, even sleeping time may be considered "hours worked" for purposes of these requirements.

The Supreme Court has consistently defined "work" broadly under the FLSA. For example, the Court held in one early case that miners needed to be paid for the time spent traveling from mine portals to underground working areas. The Court described "work or employment" as "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued

necessarily and primarily for the benefit of the employer and his business."^[3]

The Court also ruled, however, that "exertion" was not necessary for activity to constitute "work" under FLSA, stating that "an employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for something to happen."^[4]

II. Sleeping Time as "Hours Worked"

The Department of Labor's regulations^[5] deal with a variety of situations that constitute "hours worked" under the FLSA. "Under certain conditions," the regulations state, "an employee is considered to be working even though some of his time is spent in sleeping or in certain other activities."^[6] The analysis depends in part on the length of time the employee is required to be on duty.

A. Less Than 24 Hours

If the employee's period of duty is less than 24 hours, sleeping time will be considered hours worked. The applicable regulation^[7] provides, "An employee who is required to be on duty for less than 24 hours is working even though he is permitted to sleep or engage in other personal activities when not busy." The regulation gives the example of a telephone operator who is allowed to sleep when not answering calls. "It makes no difference that she is furnished facilities for sleeping. Her time is given to her employer. She is required to be on duty and the time is worktime."

B. 24 Hours or More

If the employee's shift is 24 hours or more, regularly scheduled sleeping time of not more than 8 hours may be excluded from hours worked if all the following requirements are met:^[8]

- The employer and the employee must have agreed to exclude sleeping time;
- The employer must furnish adequate sleeping facilities; and
- The employee can usually enjoy an uninterrupted night's sleep.

Note that 8 hours is the maximum exclusion from working time even if the sleeping period lasts longer than 8 hours.

The agreement is important. If no agreement is in place, sleeping time counts as hours worked. While the agreement may be express or implied, an express agreement may help avoid ambiguity or misunderstanding.

The regulation also deals with an interruption of the employee's sleeping time by a "call to duty."^[9] If the employee's sleeping time is interrupted by job requirements, the interruption counts as working time. If interruptions prevent the employee from getting a reasonable night's sleep (for enforcement purposes, at least 5 hours), the entire scheduled sleeping period must be counted as hours worked.

III. Accurate Records Important

Careful record keeping is important for all FLSA requirements pertaining to non-exempt employees. Incomplete or inaccurate records could destroy an employer's defense to a claim of improper payment.

The same concern applies when non-exempt employees are permitted to sleep on the job. For shifts of less than 24 hours, sleeping time counts as working time. For shifts of 24 hours or more, up to 8 hours of sleeping time may be excluded from working time, but only if an agreement permits the exclusion, adequate sleeping facilities are available, and the employee can normally enjoy an uninterrupted night's sleep. The employer may be called upon to show that these requirements have been met and must therefore maintain complete and accurate records.

At a minimum, the records should document the existence of the agreement required for excluding sleeping time from shifts lasting 24 hours or more. Further, as is the case with all non-exempt employees, the employer's records should show all compensable time, including sleeping time counted as hours worked under the regulations.

[1]29 U.S.C. § 206.

[2]*Id.* § 207(a).

[3]*Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123*, 321 U.S. 590. 598 (1944).

[4]*Armour & Co. v. Wantock*, 323 U.S. 126, 133 (1944).

[5]29 C.F.R. Part 785.

[6]29 C.F.R. § 785.20.

[7]*Id.* § 785.21

[8]*Id.* § 785.22(a).

[9]*Id.* § 785.22(b).

Since the publication of our June 3, 2009 article entitled "Proposed Changes in Wisconsin Comparative Negligence Law and What This Could Mean to Companies Doing Business in Wisconsin" (and our subsequent alert of June 10, 2009), more developments have occurred.

Wisconsin Governor Jim Doyle and the Legislature's Joint Finance Committee, in the budget bill, had proposed a change in the state's liability laws. The Wisconsin State Assembly voted this past Saturday not to rewrite Wisconsin's liability laws. The provisions regarding contributory negligence and jury enlightenment were

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removed from the budget bill.

This remains a fluid process. At this point, members of the Wisconsin State Senate have submitted for consideration a revised bill with the liability law amendment provisions re-inserted. (It appears as though our coverage of the status of the liability provisions in the budget bill results in an immediate change in its status. But we will take our chances again this week.) For further information regarding the recent proposed amendments, please do not hesitate to contact Attorney David Carr at david_carr@gshllp.com.

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