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OVERTIME

Paid breaks do not offset overtime under the FLSA

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Litigation under the Fair Labor Standards Act (FLSA) has been on the rise for the better part of a decade. These cases are difficult for a whole host of reasons, not the least being that the cost of litigation frequently outstrips the cost of the damages in the case. They also create significant barriers in proof because recreating an employee's work schedule for a three-year period is often difficult, if not impossible, unless the employer requires meticulous records to be kept. And even when such requirements are in place, the employees who bring these suits frequently don't comply with record-keeping policies. And now, the U.S. Court of Appeals for the 3rd Circuit (whose rulings apply to all Delaware employers) has given employers new reason to be concerned.

Donning and doffing litigation

Litigation relating to "donning and doffing" — the requirement that employees put on or take off specialized clothing or gear at the beginning and end of a shift — is a frequent source of employer angst. Historically, employers expected that employees would arrive five to 10 minutes before

the start of the shift and get dressed before they clocked in. It has long been established, however, that to the extent that special clothing is required by the employer, an employee must be paid for time spent donning and doffing such clothing.

In the case of *Smiley v. DuPont*, decided by the 3rd Circuit in October 2016, three DuPont employees sued, on behalf of themselves and a group of similarly situated employees, alleging that they had been deprived of overtime compensation for time spent donning and doffing uniforms and protective gear. The issue was not whether the workers were entitled to compensation for work performed before and after their shift — the parties conceded for purposes of the decision that they were entitled to overtime — the question was whether DuPont was entitled to an offset against any damages for the time that the employees were paid while they weren't working.

More specifically, DuPont, like many employers, provides its employees with a paid 30-minute lunch break. In addition, for employees who worked 12-hour shifts, like the plaintiffs in this case, DuPont provided two paid 30-minute breaks. Thus, on a daily basis, the employees were paid for 90 minutes of nonworking time. They alleged that they spent approximately 30 to 60 minutes per day working before and after their shift.

Under the FLSA, nonexempt employees are only paid for time spent working. Meal and other breaks do not have to be paid. Consequently, DuPont was in the position of having paid the employees for time they did not work, while being accused of not paying the employees for time that they had worked. DuPont's attorneys argued that they should be permitted to offset the unpaid work time with the paid nonworking time, noting that the length of the paid breaks always exceeded the amount of time that the employees alleged they spent donning and doffing clothes before and after their shifts.

Upset over an offset

The 3rd Circuit reviewed the FLSA and the regulations interpreting the FLSA and determined that there is no basis to permit such an offset. In

reaching its conclusion, the court focused on the remedial nature of the FLSA, emphasizing that the statute should be construed in favor of the employees it is intended to protect, and that any exceptions should be read narrowly.

Applying these standards, the court noted that the FLSA does provide for certain offsets against overtime compensation due. However, because DuPont had elected to include the break time in its calculation of the employee's "regular rate of pay" (i.e., DuPont treated the break time as time worked), it could not later use the money paid for break time as compensation for other time that was actually worked. Instead, offsets are only available for "extra compensation."

Bottom line

In most cases, an employer's decision to offer a gratuitous benefit to its employees cannot be held against the employer. The classic example is the employer's decision to offer a costly benefit to employees as an "accommodation" under the Americans with Disabilities Act (ADA). Just because the employer has once offered the benefit does not make it a "reasonable accommodation," and the employer will not be punished for its largesse.

However, *Smiley v. DuPont* illustrates one of the rare cases where a good deed is punished, and heavily. DuPont was prohibited from counting gratuitous compensation against its overtime obligations. This decision reminds employers that the FLSA is very strictly construed, and you cannot rely on a "no harm, no foul" policy to ensure that employees are adequately compensated for all of their work time. So, take this opportunity to revisit your overtime policy, ensure that employees are accurately recording their time and being paid for all hours worked, and make certain that you're not relying on a wing and a prayer for FLSA compliance.

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