To Pay or Not to Pay: An Exception to Compensating Employee Breaks

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Federal wage and hour law requires employers to compensate non-exempt employees for all work for which they "suffer or permit to work." Under the Fair Labor Standards Act ("FLSA") to suffer or permit to work means that if an employer requires or allows employees to work, the actual time worked must be compensated in accordance with minimum wage and overtime laws. With respect to the employee's break time during working hours, the compensability of the break period depends upon whether the time is spent primarily for the employer's benefit or for the employee's. This is referred to as the "primary benefit" principle which was established by the United States Supreme Court in *Armour & Co. v. Wantock*, 323 U.S. 126, 133 (1944) (holding time spent on inactive duty may be "working time" within the overtime compensation provisions of the FLSA). As a general rule, short rest breaks up to 20 minutes in duration during working time are held to be compensable, as it is believed the employer benefits from an energized, efficient workforce. 29 C.F.R. § 785.18 (short breaks "promote the efficiency of the employee"). Thus, the Department of Labor ("DOL") considers this time to be for the primary benefit of the employer, and compensable under wage and hour law.

An exception to this rule occurs when an employee's rest breaks are provided as an accommodation to the employee's own serious health condition, and are in addition to or separate from other paid breaks commonly provided by the employer to all of its employees. The Family Medical Leave Act ("FMLA") permits eligible employees to take up to twelve weeks of unpaid leave per year for, among other things, their own serious health condition. This time off may be taken as one continuous leave of absence, or taken intermittently as dictated by the employee's particular condition. There is no minimum duration of leave, so even a 15-minute break may constitute FMLA-protected intermittent leave.

The Department of Labor Opinion Letter

Recently, the DOL clarified that breaks provided to employees as an accommodation for their own serious health condition are not considered compensable time for wage and hour purposes. In its April 12, 2018 Opinion Letter, FLSA2018-19, the DOL relied on the long-standing "primary benefit" principle established in *Armour*, and advisedthat rest breaks provided to an employee as an accommodation for his or her serious health condition, that are in addition to, or separate from, customary paid breaks commonly provided to all employees, primarily benefit the employee and, thus, the time is not

compensable. In other words, employers need not pay employees for such break time. The DOL explained that this is consistent with its earlier position taken in *Sec'y of Labor v. Am, Furture Sys., Inc.,* 873 F.3d 420 (3rd. Cir. 2017), in which it stated that when an employee "requires an accommodation for a medical condition or disability that entails taking repeated short breaks, it is reasonable to conclude that the accommodation renders the break predominately for the employee's benefit and therefore non-compensable." (Opinion Letter, FLSA2018-19, n. 2).

The impetus for the DOL's April 12, 2018 advisory opinion was an inquiry from an employer faced with a number of non-exempt, FMLA eligible employees who had provided medical certifications from their healthcare providers requiring a 15-minute break every hour of their work shift as an accommodation for their own continuing serious health condition. The DOL determined these employees were not entitled to compensation for those frequent accommodation breaks. The DOL observed, however, that these same employees could not be denied compensation for breaks to the extent and frequency their co-workers received them. Thus, if all employees receive two compensable 15-minute breaks per work shift, two of the breaks taken by the accommodated employees during the work shift also must be compensated.

Intersection with New Jersey's Paid Sick Leave Statute

As with all leave taken under the FMLA, it will be the employers' choice whether employees will be required to use and exhaust any accrued paid time off concurrent with their FMLA breaks pursuant to its written leave policies. An exception to this general rule is under new State legislation entitled the New Jersey Paid Sick Leave Act.

Employers should be aware of the intersect of FMLA unpaid leave and New Jersey's recently enacted paid sick leave law, which was previously reported by Porzio's Employment Team. Under the new State law, employees accrue up to 40 hours of paid time off per benefit year and may elect to use this paid leave for their own, or a family member's, serious health condition; time needed in connection with domestic violence; the closure of the employee's workplace, or closure of the school their child attends; and time needed in connection with a school related function for their child. Thus, if the reason the employee requests accommodation breaks under the FMLA also is permissible under the State sick leave law, the employee may elect, but cannot be forced, to substitute paid sick leave to run concurrent with the FMLA breaks.

Additionally, under the new *State* law, employers are permitted to choose the minimum increments in which employees may use their accrued paid sick leave, providing it is not for a longer duration than the hours the employee was scheduled to actually work during his or her shift. Furthermore, nothing in the new law prevents the employer from requiring other paid time off, such as vacation or PTO, to be used concurrently with FMLA -- so long as the employer has a written policy.

Key Takeaway

There is not much guidance yet on the legal contours of New Jersey's new paid sick leave statute. For now, employers need to be mindful that new intersecting compliance issues must be navigated when an employee requests accommodation breaks under either the Americans with Disabilities Act or the Family and Medical Leave Act. It is important for employers

to keep in mind that any request for accommodation by an employee for personal medical reasons should be responded to immediately by engaging in the interactive process.

Additionally, employers need to review their internal sick and leave policies to ensure compliance with federal and State laws, and update them as necessary. For example, if the employer wants to require its employees to use paid time off to run concurrent with FMLA leave, it must have a written policy giving employees notice of this requirement. Also, if the employer wishes to set a minimum increment on time off that can be taken under the new State paid sick leave law, that requirement also should be memorialized in a written policy.