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## I'M FLEXIBLE, BUT GIVE ME A BREAK

**By: Eliyahu S. Scheiman**

Must an employer with a "flex time" policy pay employees for all "breaks" of 20 minutes or less, even when employees are logged off their computers and not doing any work? Yes, says the Third Circuit Court of Appeals. Secretary, *United States Department of Labor v. American Future Systems Inc.*, No. 16-2685 (3d Cir. 2017).

### Regulatory Framework on Breaks

Under the Fair Labor Standards Act (FLSA), employers need not provide employees with breaks. But if they choose to provide breaks of 5 to 20 minutes, they must pay employees for that time as "hours worked." C.F.R. 785.18. On the other hand, employers need not pay employees for "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 ... ." C.F.R. 785.16.

*American Future* involved the intersection of those two regulations: an employer's "flex time" policy, which allowed employees to log off their computers at any time, for any reason, and for any duration, and thus theoretically fell under C.F.R. 785.16, but where such "flex time" could last less than 20 minutes, and thus theoretically fall under C.F.R. 785.18.

### The American Future Employer's "Flex Time" Policy

The employer in *American Future*, Progressive, had a policy giving employees two 15-minute paid breaks per day. It later replaced that policy with a "flex time" policy eliminating paid breaks, but permitting employees to log off their computers whenever they wanted, for any reason, and for any length of time. However, employees would only be paid for time in which they were logged off their computers if 90 seconds or less.

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Progressive claimed its "flex time" policy was not a "break" policy because employees may do whatever they want, wherever they want, while logged off from their computers, and thus time when employees were logged off did not constitute "hours worked." The Department of Labor disagreed, claiming breaks of less than 20 minutes are insufficient to allow for anything other than the kind of activity that primarily benefits the employer, and are thus compensable "hours worked."

The Third Circuit agreed with the Department of Labor, finding Progressive's argument semantic, and deeming its flex time policy a "disguised" break policy:

According to Progressive, if an employer has a policy allowing employees to log off and leave their work stations at any time, for any reason, it does not have to compensate employees if they take a break. Progressive does not deny that it permits employees to log off; it just refuses to call those time periods "breaks" ... The policy that Progressive refers to as "flexible time" forces employees to choose between such basic necessities as going to the bathroom or getting paid unless the employee can sprint from computer to bathroom, relieve him or herself while there, and then sprint back to his or her computer in less than ninety seconds ... That result is absolutely contrary to the FLSA.

### **Takeaway**

Employers need not have a break policy. But they cannot sidestep the FLSA by characterizing paid break time as unpaid "flex time." Like Progressive, employers may worry that employees will abuse a break policy by taking many 19 minute breaks throughout the day. As the Third Circuit in *American Future* noted, though, the remedy for an employee's abuse of break time in such a manner is discipline or termination, not withholding compensation.

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