Coates' Canons Blog: Gap Time and the FLSA

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What is “gap time?” The term does not appear in the Fair Labor Standards Act (FLSA) or in the U.S. Department of Labor’s (DOL’s) FLSA regulations. It is, however, used by human resources and payroll professionals and appears in a number of DOL Administrator Opinion Letters. “Gap time” refers to the hours that fall between a nonexempt employee’s regularly scheduled hours and the 40 hours that an employee must work before becoming entitled to time-and-one-half overtime premium pay (for law enforcement officers and firefighters working on a 28-day work schedule it’s 171 and 212 hours respectively). When an employee is scheduled to work 40 hours per week, there is no gap time. But for employees working fewer than 40 hours –37.5 hours per week, for example – gap time is time worked between 37.5 and 40 hours. Do nonexempt employees get paid for gap time?

Background

The Fair Labor Standards Act (FLSA) requires employers to pay employees time-and-one-half their regular rate of pay for all hours over 40 that employees work in a given week, unless an employee is exempt under the FLSA’s salary basis test and one of either the executive, administrative or professional duties tests. (On the duties tests, see here**,** here, here, here and here). This post addresses the situation where an employee works fewer than the 40 hours required for premium overtime pay (or the 171 or 212 hours for law enforcement officers and firefighters) but more than the number of hours for which they were hired.

Let’s imagine two local government employees: Susan, a nonexempt helpdesk support specialist in the city of Paradise’s information technology department, and Will, a nonexempt planner in the planning department.

Gap Time and the Nonexempt Hourly Employee: The Case of Susan

Susan’s position requires her to work from 8 a.m. to 4 p.m. Monday through Friday with a half-hour unpaid lunch break for a total of 37.5 hours per week. Susan is paid on an hourly basis at the rate of $20.00 per hour. She earns a total of $750 during a normal workweek. What happens when Susan works 40 hours in a workweek? Is she paid for the additional time she works? What if Susan works 45 hours in a workweek? It turns out that the answer depends on the agreement between Susan and the city – an agreement that they may not even fully realize they have.

Suppose the IT director asks Susan to stay late one day to help with a software installation. She stays until 6:30 p.m. that night, which brings the total number of hours she works that week to 40 hours. If Susan is paid an additional $50 for the two-and-one-half additional hours she works that week ($20.00 per hour x 2.5 hours), all is well and good from Susan’s perspective.

But suppose Susan isn’t paid anything for the two-and-one-half additional hours she has worked. She is simply paid her regular $750 for the regularly scheduled hours she has worked ($20.00 per hour x 37.5 hours). Susan thinks that there has been a mistake. Her supervisor tells her that it is the city’s policy not to pay employees for gap time – the time between their regularly scheduled hours of 37.5 hours per week and 40 hours (after which overtime rules would apply). “Whaat?” yells Susan.

"Whaat" indeed! If Susan and the city agreed at the outset of her employment that she would not be compensated for gap-time hours, the city will **not** be in violation of the FLSA when it does not provide her with additional compensation for the extra hours she works. That's because of a little known hole in FLSA coverage.

The Loophole That Permits the Gap Time Exception

Given its power over the American workplace, the Fair Labor Standards Act is a surprisingly compact statute. The core requirements of the law take up only two sections: section 206 establishes the minimum wage and section 207 establishes the maximum hours an employee may work without being paid overtime premium pay. Section 206(a)(1)(c) provides simply that "every employer" must pay wages at a rate of no less than $7.25 an hour. Section 207 sets forth the basic overtime rule in subsection (a)(1):

> Except as otherwise provided in this section, no employer shall employ any of his employees . . . for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

The rules do not address Susan's situation. DOL (in its Wage and Hour Administrator Opinion Letters) and the federal courts have interpreted this silence to mean that an employer may structure the terms of employment to provide that employees will receive their stated hourly rate for all of their regularly scheduled hours, but that for "gap" hours that do not cause the employee to exceed the 40-hour maximum, no additional compensation will be paid. This may seem shocking, but such a practice does not violate the FLSA as long as the employee's total compensation for the week remains above the minimum wage when it is divided by the total number of hours worked (the regular schedule plus the additional hours). For some DOL opinion letters on this topic, see here and here. For the leading Fourth Circuit case, see *Monahan v. County of Chesterfield, Va,* 95 F.3d 1263 (4th Cir. 1996).

If we take Susan's compensation for her regular schedule, namely, $750 per week ($20.00 per hour x 37.5 hours), and divide it by the total number of hours she has worked that week (40), we get an average hourly wage of $18.75, well above the minimum wage. So there is no violation of the FLSA, even though she received no extra pay for the gap-time hours worked. Compare Susan's situation with that of an employee earning only $7.50 per hour. That employee's weekly earnings would be $281.25 for a regular 37.5 hour per week schedule. If the employee were to work 40 hours this week without receiving any additional compensation for the gap time, his average hourly wage would be $7.03 per hour. Under these circumstances, the city would be violating the FLSA by not compensating the employee for the gap time hours worked, but only because the average hourly wage falls below the federal minimum, not because the city failed to pay the hours between 37.5 and 40.

Agreement Not to Pay for Gap Time

In this hypothetical, the city's ability to not compensate Susan for those extra two-and-one-half hours ultimately depends on whether Susan has agreed to this arrangement. "Agreement" is a relative term here: the issue is whether Susan knew in advance that she would not be compensated for the gap time hours and worked them anyway. About "agreement," the Fourth Circuit has said:

> Where the parties' actions and the circumstances demonstrate that the plaintiff was aware of a particular condition of employment, the employee's acceptance of, and continued, employment manifests acceptance of the condition. However, if the employee contemporaneously protests, there is no implied agreement to the condition.

If the city's policy not to pay for gap time is set forth in an employee handbook, and Susan has received a copy and given written acknowledgement of having read it, a court would likely say that Susan has impliedly agreed to its terms. Even if there is no written policy, a court will likely find employee agreement to a policy not to pay for gap time if, in actual practice, the city does not pay for gap time and employees like Susan work gap time hours without pay. On the other hand, if no one had ever tells Susan that this policy is part of the terms and conditions of her employment, and Susan complains in the first instance, a court will not say that Susan has agreed to those terms. Under those circumstances, Susan would be owed compensation for the 2.5 gap time hours at her regular $20.00 per hour rate.

Unpaid Gap-Time Claims Must Be Brought in State Court

Here's another FLSA fact that will knock your socks off: even if Susan is owed gap-time compensation because there was no "agreement", she cannot bring a claim for those unpaid hours under the FLSA. The Act is violated only when an employer either fails to pay an average of the minimum wage for all straight-time hours worked (a violation of section 206) or fails to pay time-and-one-half the employee's regular rate for hours worked over 40 (or fails to credit the employee with comp time) (a violation of section 207). The FLSA does not authorize a lawsuit to recover unpaid gap-time wages. The failure of an employer to live up to any non-FLSA promises it has made about wages is not a violation of the FLSA. An employer's promises about wages may be enforced only by bringing a breach of employment contract lawsuit in state court. It is there that Susan will have to seek back pay.

May the City Compensate Susan Anyhow?

If the city does not have to pay Susan for gap-time hours, could it compensate her with hour-for-hour paid time-off for the hours between 37.5 and 40? The answer to this question is "yes." The fact that the city does not have to pay Susan for gap-time hours does notprevent it from doing so. It could pay her regular hourly rate or a lower hourly rate or it could giv her paid time off.

Non-overtime versus Overtime Workweeks

What happens if Susan works overtime one week? Suppose Susan works 45 hours one week instead of her regularly scheduled 37.5. Must she be paid for the gap-time hours under these circumstances?

DOL addressed this issue in a 2004 opinion letter, in which it said that in an overtime workweek, an hourly employee must be paid the agreed-upon hourly rate for all straight time hours worked, as well as the premium due for all overtime hours. In an overtime workweek, the gap time hours must be paid in cash and cannot be compensated with comp time. This is true whether overtime is paid in cash or in FLSA compensatory time-off (one-and-one-half hours paid time off for every hour worked over 40). This is the conclusion that the Fourth Circuit has earlier reached in the *Monahan* decision. And in this situation, Susan could file a complaint with DOL or bring a lawsuit under the FLSA in state or federal court.

Gap Time and the Nonexempt Salaried Employee: The Case of Will

Is the result any different when a nonexempt employee is paid on a salary basis? Susan is paid on an hourly basis. But the FLSA permits employers to pay nonexempt employees on a salary basis Let's take a look at what happens to Will.

Will works as a planner for the city of Paradise. Although Will is a nonexempt employee, the city pays him on a salary basis for a 37.5 hour workweek. He earns $960 per week. In other words, Will earns $960 each week for as many hours as he works, up to and including 37.5 (on the salary basis test, see here). Like any nonexempt employee, Will earns time-and-one-half premium pay when he works more than 40 hours in a workweek. But with one of the other planners out on FMLA leave, Will lately finds himself working more than 37.5 hours per week. Some weeks he works no more than 40 hours, but in others he works overtime hours.

Whether Will is entitled to compensation for gap-time hours when he works between 37.5 and 40 hours depends on whether his salary is meant to compensate him for a fixed 37.5 hour workweek or for as many hours as he works in any given week. If Will's salary is meant to cover a fixed 37.5 hour workweek, then he should be compensated at his hourly rate for any additional non-overtime hours he works. (Note that like Susan, Will would have to file a breach of contract suit in state court to recover unpaid gap time compensation.) If Will has expressly or impliedly agreed to work for $960 per

week for ***all*** non-overtime hours worked, he is not entitled to additional compensation for any hours worked between 37.5 and 40. See 29 CFR §§ 778.322 and 778.323.

Sometimes employers fail to make clear whether a nonexempt employee's salary is meant to cover a fixed workweek or a variable workweek. In that case, courts will look to workplace practice to determine the terms of the employment contract. If Will does not complain the first time he is paid only his regular salary for weeks in which he works gap time hours, and he continues to work the gap time hours, a court would likely find that he has agreed to a fixed salary for a variable-hour workweek.

None of this changes when Will works overtime hours. If his salary is meant to only cover 37.5 hours, the city must pay Will his gap-time hours at the pro-rated hourly rate (see 29 CFR § 778.322). If his salary is meant to cover all of the hours he might work up to 40, however many they might be from week to week, then he is not owed any additional compensation for gap time hours. What is determining here is "agreement of the parties as to what the salary is intended to compensate." *See Monahan*, 95 F.3d at 1283; 29 CFR § 778.323.

Law Enforcement Officers and Fire Fighters Paid under the 207(k) Exemption

The gap-time compensation rules are the same for law enforcement officers and firefighters as they are for Susan and Will, whether they are paid on an hourly or salaried basis, and whether overtime is calculated on the basis of a 40-hour workweek or using the 207(k) exemption's longer work periods and high maximum hour threshold (on the 207(k) overtime exemption for law enforcement and fire personnel, see here).

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