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## HOURS OF WORK/PAYABLE TIME FOR NON-EXEMPT STAFF

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*Note: This guidance offers general information about hours of work/payable time for non-exempt staff under the Fair Labor Standards Act (FLSA) and M.G.L. c. 151. It is not a comprehensive treatise of the FLSA or any other federal or state law or regulation. For more information, contact the campus or system Human Resources Department of the Office of the General Counsel.*

### I. Introduction

Non-exempt staff must generally be paid overtime (at least one and one-half times the regular rate of pay) for all payable work time in excess of forty hours in a workweek.<sup>1</sup> Massachusetts law also requires overtime pay to state employees for work in excess of eight hours in a workday (subject to other arrangements made pursuant to a collective bargaining agreement). See, [M.G.L. c.149, §30B](#).<sup>2</sup> Therefore, it is important to understand when a non-exempt staff member's time is payable, or, in other words, when he or she is "working."

NOTE: The information below describes the rules in the absence of a collective bargaining agreement. For example, although as described more fully in ¶ III(A), below, certain on-call time may not be payable, a collective bargaining agreement may provide for on-call pay or other compensation arrangement.

### II. Generally

Non-exempt staff must be paid for all hours of work for which they are "employed," whether "suffered or permitted" by the employer. [29 CFR § 825.105\(a\)](#).<sup>3</sup> It is not necessary for the work to be specifically assigned by a supervisor. Mere *knowledge* by the employer that the work was done is sufficient to create the necessary employment relationship to render the time "hours of work" and payable.<sup>4</sup> The Department of Labor has stated that, even if an employee volunteers to stay late to finish up a project or to even to correct his or her own mistakes, the time is payable. [29 CFR § 785.11](#); see also, [Fact Sheet #22: Hours of Work under the Fair Labor Standards Act \(FLSA\)](#). Note that *where* the work occurs is irrelevant to the analysis (see, ¶ III(F), below for a discussion about work at home). See, [29 CFR § 785.12](#).

Even if there is a written work rule prohibiting non-exempt employees from working beyond their scheduled hours, an employer must "make every effort" to enforce the rule. [29 CFR § 785.13](#). That may include *disciplining* an employee for working too much (but note that, even if the employee is disciplined, he/she must be paid for the time worked).

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<sup>1</sup> Note that, although some collective bargaining agreements provide otherwise, only payable time that is actually worked is counted toward the forty-hour requirement (e.g. paid sick leave is not counted).

<sup>2</sup> Note that [M.G.L. c.149, §30B](#) is among those laws that may be superseded by the terms of a collective bargaining agreement. See, [M.G.L. c. 150E, § 7\(d\)\(i\)](#).

<sup>3</sup> And, all those hours are included in the hours-of-work calculation to determine whether an employee has reached the threshold for overtime pay.

<sup>4</sup> However, the hours of work are not payable if the employer has no knowledge that the work was being performed—particularly, if the employee purposefully shields the work from the employer and later files a claim.

### III. Specific Issues

#### A. Wait Time

Whether an employee's time is payable while waiting depends on whether the employee is "engaged to wait" or "waiting to be engaged." The distinction primarily rests upon the length of time and whether the employee is able to use the time effectively for his or her own purposes.

*On duty.* Employees are always working when they "on duty." Being on duty generally means that time belongs to and is controlled by the employer (that the employee is unable to use the time effectively for his or her their own purposes). For example, an employee who is regularly scheduled to work from 8:30 AM to 5:00 PM is on duty during that time; with the possible exception of an unpaid meal period (see, ¶ III(B), below) all time between 8:30 AM and 5:00 PM is payable--even if the employee engages in amusements while waiting to begin or complete an assignment (e.g. reading a book while waiting for a machine to be repaired). In that sense, the employee is "engaged to wait."<sup>5</sup> See, [29 CFR 785.15](#).

*Off Duty.* When an employee is completely relieved of all responsibility for long enough periods to permit the employee to use the time effectively for his or her their own purposes, employee is "waiting to be engaged," and, therefore, the time is not time worked and is not payable—even if the employer places some restrictions on the employee. See, [29 CFR § 785.16](#). In one case, the Wage and Hour Division determined that an employee was free to engage in personal activities, even though he was required to be reachable, refrain from alcohol, and able to report to work with an hour. Therefore, in that case the time the employee was "on-call" was not payable. See, [Wage and Hour Division Opinion Letter, FLSA2008-14NA \(2008\)](#). However, when the restrictions or number of calls sufficiently interferes with an employee's use of time, the on-call period may be deemed payable.

Note that, even if it is not possible for the employee to return home while he or she is "waiting to be engaged," the time may not be payable—as long as the employee is completely free to use the time effectively for his or her their own purposes. See, [29 CFR § 785.16\(b\)](#); see also, ¶ III(G), below.

#### B. Rest and Meal Periods

*Breaks.* Rest periods generally shorter than 20 minutes are payable. See, [29 CFR § 785.18](#).

*Lunch and Other Meals.* Generally, a break of 30 minutes or more need not be payable—as long as the employee is completely relived of his or her duties.<sup>6</sup> If the employee is required or even just permitted to perform work (whether active or inactive) that predominantly benefits the employer, the time is payable. See, [29 CFR § 785.19](#). For example, an administrative assistant who eats lunch at his or her desk and occasionally answers the department telephone or directs visitors is working—even if the telephone rings very sporadically or rarely (as long as there is an expectation that when it *does* ring, it will be answered). But note that an employer need not allow the employee to leave the premises—as long as the employee is otherwise completely relieved of all duties. See, [29 CFR § 785.19\(b\)](#). However, even if an employee is generally completely relieved of all duties, he or she must be paid for any work actually performed during the otherwise unpaid meal period. For example, if a nurse who is generally granted a thirty-minute unpaid meal period is called to the Health

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<sup>5</sup> Of course that is not to say that a supervisor cannot reassign the employee to another task during such times.

<sup>6</sup> Massachusetts law prohibits employers from requiring employees to work more than six hours in a calendar day without at least a thirty-minute mean break. See, [M.G.L. c.149, § 100](#).

Services Department to deal with an emergency, he or she must be paid for any such time. Further, if such calls are sufficiently frequent, the employer may be required to pay the nurse for the entire meal period.

### C. Sleep

*Sleeping While on a Tour of Duty of Less than 24 Hours.* When an employee is assigned to a tour of duty for a period of less than 24 hours, sleep time is payable (whether or not the employer furnishes sleeping facilities). For example, a snow plow driver is permitted to sleep for a couple of hours during a long snow event. See, [29 CFR § 785.21](#).

*Sleeping While on a Tour of Duty of at Least 24 Hours.* An employee who is assigned to a tour of duty of at least 24 hours, may, under certain circumstances, agree to an unpaid rest periods of no longer than 8 hours.<sup>7</sup> See, [29 CFR § 785.22](#).

*When the Employee Resides on the Employer's Premises.* The Department of Labor recognizes that an employee (like a residence director) who lives on the employer's premises is not working all the time that he or she is on the premises. Because there are periods for "eating, sleeping, entertaining, and other periods of complete freedom from all duties when he may leave the premises for purposes of his own," the Department of Labor will accept any reasonable agreement concerning hours of work—as long as the agreement considers all of the pertinent facts.<sup>8</sup> See, [29 CFR 785.23](#).

### D. Before and After Work Activities

Work that is "integral" to the principal activity is payable. Such work could include rollcall or other shift-change discussions or activities, setup or breakdown work, changing into or out of protective clothing,<sup>9</sup> or cleaning up a workspace (and even, in some cases, allowing an employee to shower). See, [29 CFR 785.24](#).

### E. Training Programs

Time spent in training is generally payable, unless (all four conditions must be met):

1. Attendance is outside of the employee's regular working hours;
2. Attendance is voluntary;

NOTE: Any suggestion that the employee's "present working conditions or the continuance of his [or her] employment would be adversely affected by nonattendance," may render attendance involuntary. See, [29 CFR 785.28](#).

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<sup>7</sup> Note that, although for Fair Labor Standards Act purposes, such an agreement may be made on an individual basis, for employees represented by a union, any such agreement must be negotiated through the union. See generally, [M.G.L. c.150E, §6](#).

<sup>8</sup> See, n.7.

<sup>9</sup> As long as the clothing is necessary in the performance of the job and not merely a convenience. A case in point is *Steiner v. Mitchell*, 350 U.S. 247 (1956), where the U.S. Supreme Court determined that employees in a chemical plant must be compensated for time spent changing their clothes before and after work. Because of the nature of the chemicals the employees used during their shift, it was not possible to change at home (therefore, changing at work was not a convenience).

3. The course, lecture, or meeting is not directly related to the employee's job;

NOTE: Training that would tend to make an employee better at his or her present job will generally be considered “related to the employee’s job” as opposed to training that it intended to prepare an employee for advancement to a new job (even if such training would also “incidentally” make the employee better at his or her present job). See, [29 CFR 785.29](#). However, note that if an employee voluntarily attends an *independent* school, college or trade school (not associated with the employer), the hours of attendance need not be counted as hours worked—even if such “independent” training is directly related to his or her job. See, [29 CFR 785.30](#); see also [29 CFR 785.31](#) (an employer benefit like tuition reimbursement does not render such voluntary attendance at an independent school, college, or trade school compensable).

4. The employee does not perform any productive work during such attendance.

See generally, [29 CFR 785.27](#).

#### F. Work at Home

Work at home is payable under all of the same rules as work away from home. However there are special problems that can arise. First, the “suffer or permit” rule applies to all non-exempt employees—regardless of their location. If an employer knows or has reason to know that an employee is performing work for the benefit of the employer, the time is payable. See generally, ¶ II, above (work performed at home during an employee’s off hours to catch up on late work or to correct mistakes is payable—as long as the employer knows or has reason to know that the work was being performed).

*Technology.* Technology has permitted employees to work from anywhere at anytime. Sending a non-exempt employee an email during his or her off hours may result in an expectation of an immediate response. If so, the time spent to read the email and to compose a response—including researching the response and waiting for others to provide information to formulate a response—may be payable. See, ¶ III(A), above concerning wait time. To avoid overtime, supervisors should avoid after-hours email or note that any response is not due until the next regular work day.

#### G. Travel

*To or From Work.* Under the principles of the [Portal-to-Portal Act of 1947](#), generally the time an employee spends commuting to work is not payable. See, [29 CFR § 785.35](#). However, if an employee spends the commute on the telephone with the employer—for example, troubleshooting a problem or getting an assignment to begin as soon as the employee arrives, the time is payable. Similarly, detours on behalf of the employer (e.g. to pick up supplies on the way to work) may be payable if not *de minimis*.

*To and From a One-Day Temporary Work Location.* When an employee travels to and from a one-day temporary work location, all travel time in excess of the typical commute is payable.<sup>10</sup> See, [29 CFR § 785.37](#). For example, a non-exempt employee who is scheduled to work 8:30 AM to 5:00 PM and typically commutes 30 minutes to and from the Dartmouth campus, attends a meeting at the Amherst campus. That day, the

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<sup>10</sup> The employer may deduct the time the employee would have normally spent commuting to his or her regular work location.

employee leaves home at 6:30 AM and arrives at Amherst at 9:00 AM. The employee leaves Amherst at 3:00 PM and, because the traffic is heavy, arrives back home at 6:00 PM. The employee's payable time for that day is from 6:30 AM until 6:00 PM, less an allowance of one hour (plus any unpaid meal break).<sup>11</sup> However, if the employee makes more than a *de minimis* detour for his or her own purposes, the payable time ends. For example, if while returning from Amherst, the above employee decides to meet a friend for dinner in Worcester at 4:30 PM, the payable time ends.

*While on Duty.* Travel that occurs during an employee's regularly scheduled tour of duty is payable. See, [29 CFR § 785.38](#). For example, a non-exempt employee who is scheduled to work 7:00 AM to 3:00 PM leaves the campus at 8:30 AM to travel to a supplier to pick-up a part. The employee returns at 10:00 AM. The employee's payable time for that day is her regular 7:00 AM to 3:00 PM shift—even if the employee is only a passenger in the vehicle.<sup>12</sup>

*Overnight Travel to another City.*

a) Travel that occurs during an employee's regularly scheduled work hours is payable—even if such travel occurs on an employee's typical day off. For example, an employee who is regularly scheduled to work Monday-Friday, 8:30 AM to 5:00 PM is required to take a train to New York City on Sunday to be at a meeting on Monday morning. The employee leaves his/her house at 10:00 AM, arrives at the train station at 11:00 AM and is on the train from 12:00 PM until 4:00 PM. Because all of the travel hours are during the employee's regularly scheduled work hours, all of the time traveling is payable—without deductions for meal periods.

NOTE: If an employee is offered public transportation but instead (with permission) uses his or her own vehicle, the employer may count as payable time either: 1) the time spent driving; or 2) the time that would have been spent if the travel was by public transportation. For example, an employee travels to New York City and, rather than take a one-hour flight, prefers to take his or own car (which takes four hours). The employer may choose to pay for only the one hour that it would have taken if the employee had flown. See, [29 CFR § 785.40](#).

b) Travel that occurs outside of an employee's regularly scheduled work hours is not payable, unless the employee performs work on behalf of the employer while traveling.

c) The typical rules for payable time apply when an employee is in another city. For example, an employee who is regularly scheduled to work 8:30 AM to 5:00 PM travels to New York City on Day 1 (see above) and stays the night in a hotel. Once the employee reaches the hotel (or if the travel occurred on a regularly scheduled work day, 5:00 PM) and is completely released from all responsibilities, the time is not payable.<sup>13</sup> On Day 2 (a regularly scheduled work day), the employee attends a meeting from 10:00 AM to 4:00 PM, and returns to the hotel. The employee's entire regularly scheduled work day is payable, but the time at the hotel after 5:00 PM is not payable—as long as the employee is completely released from all responsibilities. See generally, [29 CFR § 785.39](#).

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<sup>11</sup> But note that if the meeting includes a "working lunch," the meal break is payable.

<sup>12</sup> If the travel while at work includes the typical unpaid lunch period, the lunch period may be deducted—as long as the employee can effectively for his or her their own purposes. For example, if the employee is required to stay with a truck while it is being loaded at a supplier, but eats his lunch while waiting, the lunch period is payable.

<sup>13</sup> Of course, if the employee is required to review materials at the hotel in preparation for the meeting, that time is payable.

## H. Compensatory “Comp” Time

As a state agency, under certain circumstances and within certain limits, the University may award non-exempt employees compensatory “comp” time in lieu of overtime for payable work in excess of forty hours in a workweek. *See generally*, [29 U.S.C. § 207\(O\)](#).

The comp time arrangement must either be pursuant to a collective bargaining agreement or individually agreed to by both the employee and the employer: in the absence of a specific provision in a collective bargaining agreement, neither the employer nor the employee can require compensatory time. *See*, [29 CFR 553.23](#); [29 CFR 553.26](#).

Compensatory time must be awarded at the same rate as overtime. *See*, [29 CFR 553.20](#). For example, if a non-exempt employee works 45 hours in a workweek and, pursuant to [29 CFR 553.23](#), the employer and the employee agree that the employee will be awarded compensatory time in lieu of overtime pay, the amount of compensatory time awarded is 7.5 hours (5 hours x 1.5).

Compensatory time balances cannot exceed 240 hours (480 hours for certain public safety, emergency, or seasonal work). [29 U.S.C. § 207\(O\)\(3\)\(A\)](#). *See also*, [29 CFR 553.24](#).

Although an employer may limit an employee’s use of compensatory time to a “reasonable period” following the award, the compensatory time does not expire. Rather, the employer, after a reasonable time may pay the compensatory time as a cash payment. *See*, [29 CFR 553.27](#); [29 CFR 553.26](#).<sup>14</sup>

An employer must pay awarded, but unused compensatory time at termination. *See*, [29 CFR 553.27](#)

NOTE: The Fair Labor Standards Act recognizes that there could be other compensatory time awards (e.g. for working on a holiday or even to exempt employees). *See*, [29 CFR 553.28](#). The compensatory time rules described above do not apply to “other compensatory time.” In other words, it can be paid as straight time, have limits and expiration dates, and no cash value upon termination.

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<sup>14</sup> When calculating the cash payment, the payment is (1) the average regular rate of pay received by the employee during the last three years employment, or (2) The regular rate of pay received by such employee, *whichever is higher*. *See*, [29 CFR 553.27](#).