

Mandatory Off-Site Counseling Sessions May Be Paid 'Work Time'

If you require hourly employees to attend counseling or training workshops outside normal working hours as a condition of employment, you may need to pay employees for those hours. You may also need to pay the employees' travel time, too.

If other courts pick up the new 7th Circuit ruling, you may be required to pay overtime for employees' time spent in required off-duty medical treatment, psychological treatment or drug counseling.

Recent case: After police 911 dispatcher Kari Sehie walked off a double shift, the department ordered her to attend stress counseling each week or else she'd lose her job. The sessions were outside her normal work hours and took up three hours per week, including her drive to and from the counselor's office.

Sehie attended 16 sessions and then quit. She sued, demanding overtime pay for the hours spent on the couch and driving back and forth from the sessions. The court agreed that she should be paid because the counseling was mandatory and primarily benefited her employer. (*Sehie v. City of Aurora*, No 04-2308, 7th Cir., 2005)

Final tip: To avoid this risk, don't require employees to receive treatment or counseling as a condition of employment. A voluntary referral to your employee assistance program is a better idea and likely won't expose you to overtime liabilities. Even if you have employees sign "last-chance" agreements to obtain drug counseling, don't mandate that the employee receive treatment.

The FLSA: What counts as paid time?

The Fair Labor Standards Act requires employers to pay nonexempt employees for all time worked, but the law doesn't define the word "work." Courts and the Labor Department have filled that gap with a three-part test. It says you must pay employees for time that meets all these criteria:

1. Is spent in physical or mental exertion, whether burdensome or not.
2. Is controlled or required by the employer.
3. Is pursued necessarily and primarily for the employer's benefit.

Thus, activities away from the workplace must be paid time if the employer requires and sets the parameters and it primarily benefits the employer. That includes most training and medical or psychological testing if, in the words of a Labor Department opinion letter, the "time spent in taking such examinations is time during which the employee's freedom of movement is restricted ... and is subject to the employer's direction and control."