

New DOL bulletin — Compensable break time for remote employees

Back in 2020, the Department of Labor released a Field Assistance Bulletin to its investigators, which concluded that an employee who worked in the office, ran errands during the afternoon, and continued working at home didn't need to be paid for the time she was running errands because it was personal time. However, things get a bit muddier with remote employees, and the DOL's guidelines and regulations are constantly being updated.

Continuing its exploration of how working time issues impact nonexempt telecommuters, the DOL's latest [FAB](#) evaluates the compensability of break time.

FMLA issues are also addressed in the FAB and in a new [FLSA opinion letter](#).

Break time

Where you work and why you work there aren't relevant for wage-and-hour purposes. The FLSA requires you to pay nonexempts for every hour they work, including short breaks of up to 20 minutes (the DOL calls these rest breaks). You don't have to pay nonexempts for breaks of at least 30 minutes, if they're completely relieved of their duties.

Scenario #1—compensable meal breaks

Alison lives in Chicago and works for a New Jersey employer at a co-working space. She has 30 minutes for lunch, but she frequently answers business calls during her meal breaks.

Conclusion: Alison isn't completely relieved of her duties, so she must be paid for her meal breaks.

Scenario #2—non-compensable personal time

Barrie works from home. Her employer agrees to allow her to set her own schedule. She starts work at 7:00 a.m., takes a one-hour break from 8:00 a.m. to 9:00 a.m. to get her kids ready for school, and resumes work at 9:00 a.m.

Conclusion: The one-hour break is non-compensable personal time, since Barrie is completely relieved of her duties, chooses when to resume work, and is able to effectively use the time for her own purposes.

Sometimes it's messy

Employees' workdays aren't as neat as the DOL would like them to be—they log into their email or Slack channel, deal with the important stuff, then make coffee and eat breakfast, after which they throw a load of laundry in. How should this time be accounted for? According to the DOL, where an employee works doesn't matter; the general rule applies—short breaks of up to 20 minutes are compensable.

But there's another applicable general rule. If you know or have reason to know nonexempts are working

through their non-compensable break times, you must pay for it. The DOL requires you to maintain a [reasonable method](#) for nonexempts to report their working time. If they don't use it, you're off the hook to pay for unscheduled working time, including overtime.

Bottom line: Successful telecommuting arrangements depend on good communication between you and your WFH employees and setting reasonable expectations regarding working and nonworking time. These expectations should be formalized in a **written agreement**. Written agreements should be updated to reflect any changes to an agreed-upon work schedule.

Telecommuting and the FMLA

Employers become covered under the FMLA when they have 50 employees working at the same location within 75 miles.

For FMLA purposes, an employee's home isn't a workplace. *DOL:* When an employee works from home, their worksite for FMLA eligibility purposes is the office to which they report or from which their assignments are made.

Scenario—employer covered under the FMLA

Sparky's headquarters are located in New York City; 40 employees work there. More than 300 employees work within a 75-mile radius of Sparky's office and many other telecommuters live in distant cities and states.

Belinda, a data analyst, lives in Guilford, CT. She receives her assignments, as do the other telecommuters, from managers who all work at the headquarters office. *Bottom line:* Sparky is covered under the FMLA, because it must count the 300 employees who work within 75 miles of its headquarters. Belinda's worksite is also New York City, because this is the office from which she receives her assignments.

FMLA, ADA, or both?

In the opinion letter, the DOL concluded the FMLA entitles an employee who has a chronic serious health condition to limit their workday to eight hours a day for as long as they have FMLA leave available, even if their normal workday is longer than eight hours.

The letter also made these key points:

- The employee could also qualify for an accommodation under the Americans with Disabilities Act, and if this were the case, the employer would be required to honor both laws in a manner that provides the most beneficial rights and protections to the employee.
- Employees are entitled to 12 workweeks of unpaid FMLA leave, or 480 hours (40 hours × 12 months). If an employee's workweek is normally longer than 40 hours, they are entitled to more than 480 hours of leave.

Catch: DOL opinion letters may not be used or cited as precedent. They are intended as advice to the inquiring employer only.