



Time Well Spent Session 7: Compensable Work Time

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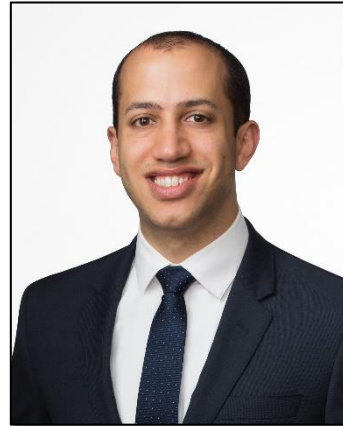
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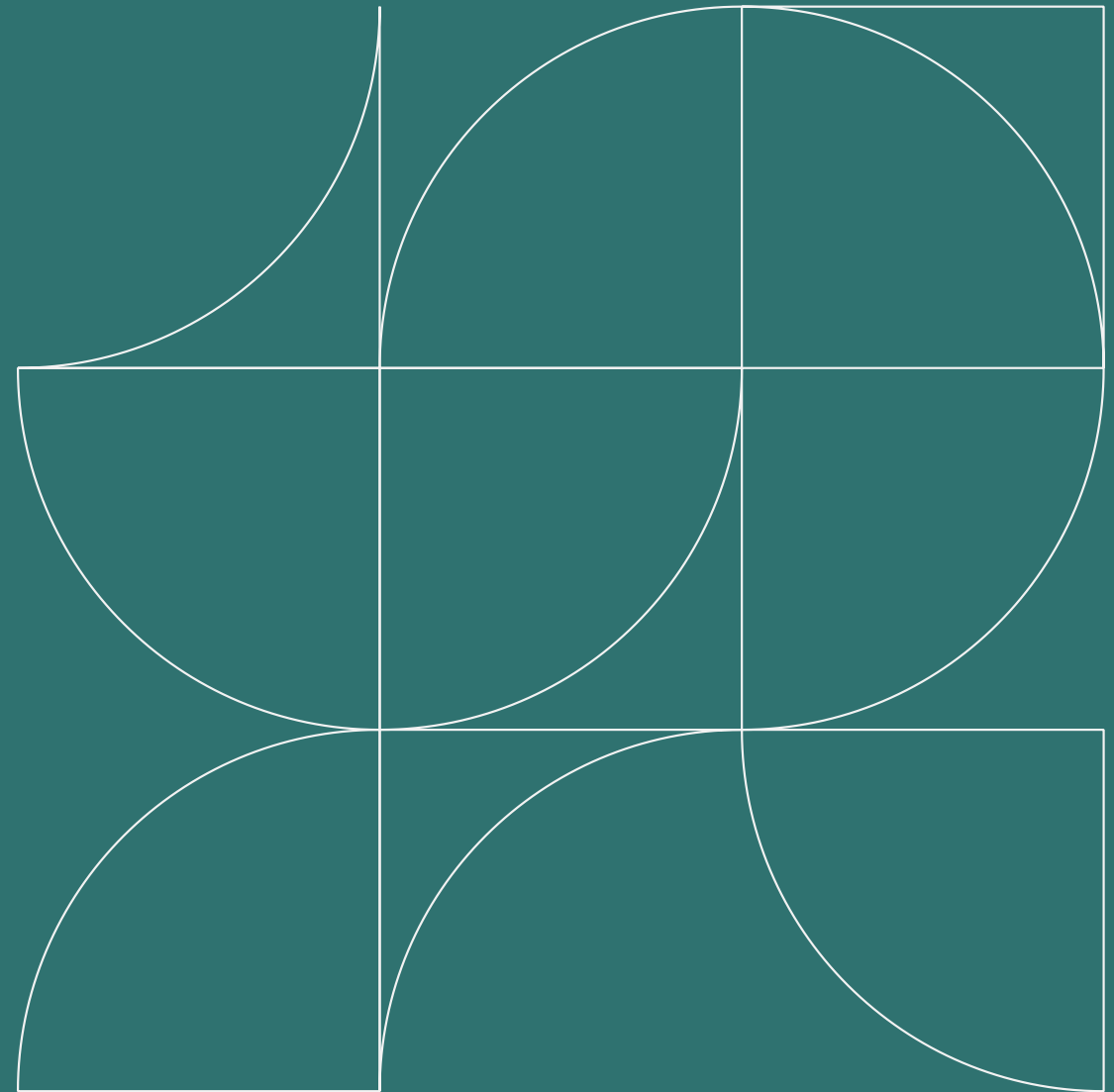


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Agenda

- 1 | Background
- 2 | Pre-Shift and Post-Shift Activities
- 3 | Meal and Rest Breaks
- 4 | Work During “Off Hours”
- 5 | Special Defenses

Background on What Constitutes Hours Worked



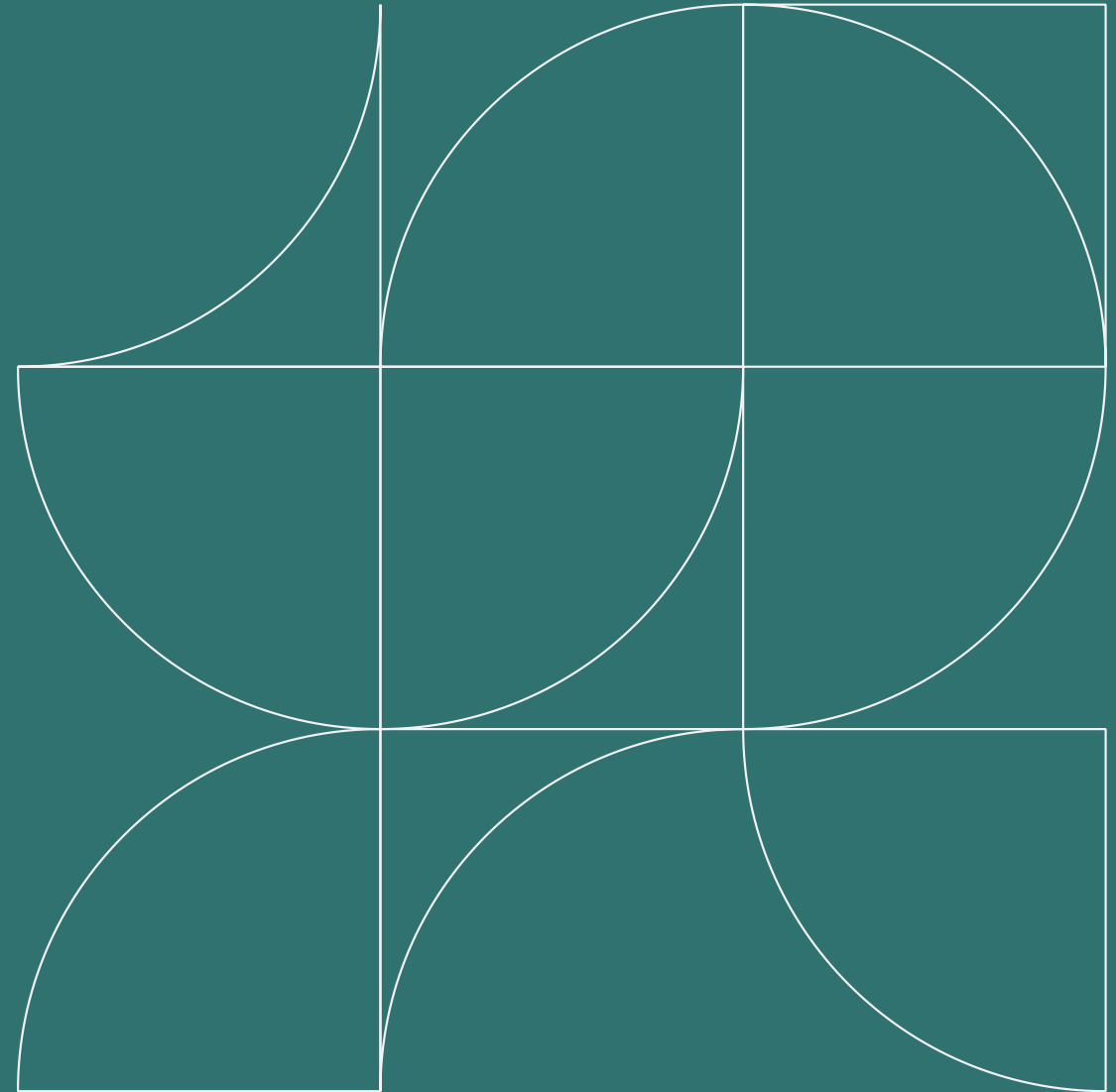
What Does It Mean to “Work”?

- Some activities are easy to identify – *e.g.*, time engaged in the tasks the employee has been hired to perform.
- Others are harder. For example, what about:
 - Time an accountant spends booting up her computer before beginning to perform her tasks?
 - Time a retail worker spends walking through a security checkpoint on his way out after his shift?
 - Time a construction worker spends traveling among different job sites?
 - Time a plant worker spends donning and doffing protective equipment?

What Does It Mean to “Work”?

- Governed by federal and state law; generally, the more protective will control.
- FLSA
 - Portal-to-Portal Act
 - Continuous Workday Rule
- State-specific rules
 - Some follow the FLSA
 - Others – like California – have their own rules
 - Time an employee is subject to the control of an employer, and all time an employee is suffered or permitted to work whether or not required to do so.

Pre-Shift and Post-Shift Activities



Travel & Commuting Time – Federal Principals

- Home-to-work travel = **Not compensable**
 - *Bennett*, 855 F. App'x 932 (5th Cir. 2021): time that construction workers spent traveling to and from remote work site on employer-provided buses not compensable.
- Travel on employer's premises = **Not compensable, if before principal activity**
 - *Bonilla v. Baker Concrete Construction, Inc.*, 487 F.3d 1340 (11th Cir. 2007): time spent riding buses from employee parking lots to security gate, going through airport security, and riding contractor's authorized vehicles to various work sites not compensable.
- Travel between work sites = **Compensable**

Travel & Commuting Time – Federal Principals (continued)

- Time spent performing principal activities at home and then commuting to work are harder—fact specific.
 - Small amount of time in the morning before commute or in the evening after commute has been held to be non compensable, where employee has flexibility of when to do such activities and could use time for his or her own purposes.
- Use of company vehicle does not automatically create working time, and activities incidental to the use of the vehicle generally not considered part of the employee’s principal activities.

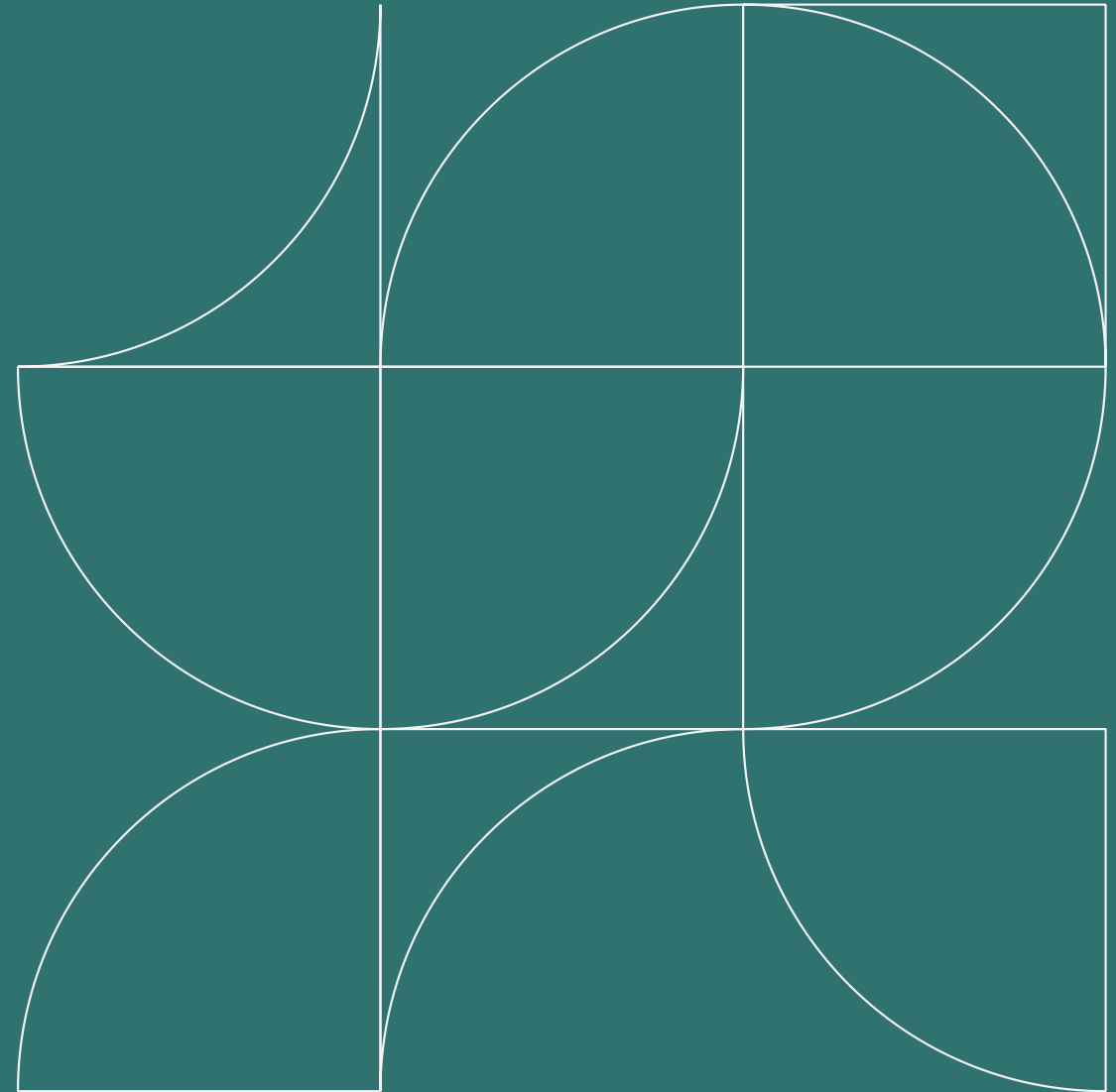
Travel & Commuting Time – California and Other State Laws

- Commute time
 - California
 - Maryland
- *Huerta v. CSI Electrical Contractors*, 15 Cal. 5th 908 (2024)
 - Time spent on an employer's premises in a personal vehicle and waiting to scan an identification badge = **Compensable**
 - Time spent on employer's premises in a personal vehicle, driving between a security gate and employee parking lots while subject to employer rules = **Not compensable**

Preparing For and Concluding Work

- **Activities integral and indispensable to an employee's work activities**
- COVID screenings / security checks
 - *Integrity Staffing Solutions, Inc. v. Busk*, 574 U.S. 27 (2014)
 - *Frlekin*, 8 Cal. 5th 1038 (2020)
- Boot-up time
 - *Cadena v. Customer Connexx LLC*, 51 F. 4th 831 (9th Cir. 2022)
 - *Peterson v. Nelnet Diversified Solutions, LLC*, 15 F.4th 1033 (10th Cir. 2021)
- Donning and doffing
 - Whether donning and doffing is (1) required by the employer, (2) necessary to the principal work performed, and (3) primarily for the benefit of the employer.
 - If able to be performed at home, likely non-compensable.
 - Different tests in different Circuits.
 - Collective bargaining agreements—29 USC § 203(o).

Meal and Rest Breaks



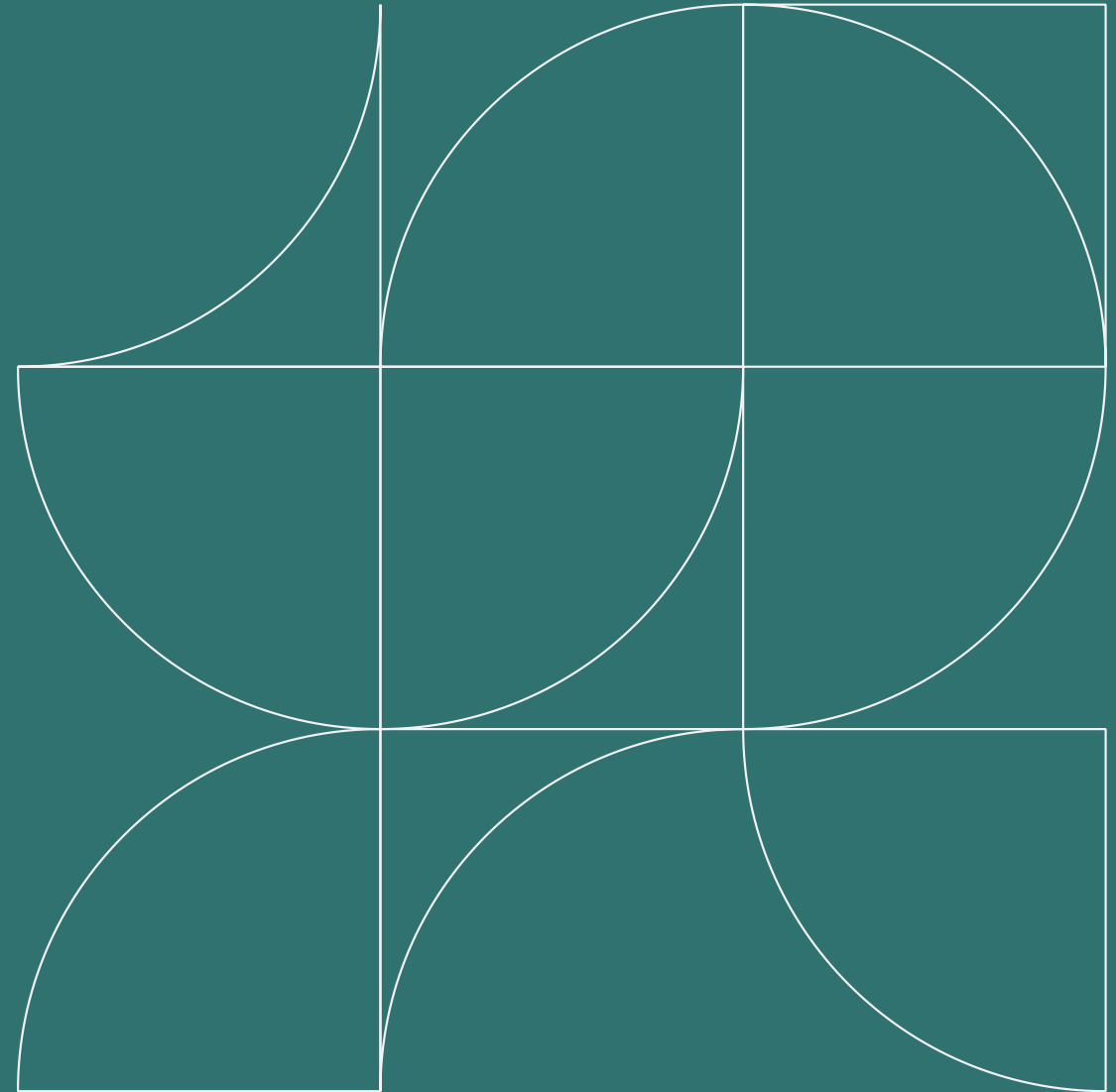
Meal and Rest Breaks Under Federal Law

- Federal law does not require employers to provide rest or meal breaks.
- Rest periods of short duration (5 to 20 minutes) = **Compensable**
- Rest periods of longer duration (30 minutes or more) = **Not compensable, if employee completely relieved from duty**
 - Limitations and restrictions on employee
 - Extent to which those restrictions benefit the employer
 - Duties for which the employee is responsible during meal break
 - Frequency with which the meal break is interrupted
 - Whether employee allowed to resume an interrupted break

Meal and Rest Breaks Under State Law

- California
 - Employer obligations
 - Meal Periods
 - Waiver options
 - Rest breaks
 - Ability to leave premises
 - Best practices: Attestation system
- Other States
 - Requirements with little enforcement

Work During “Off Hours”



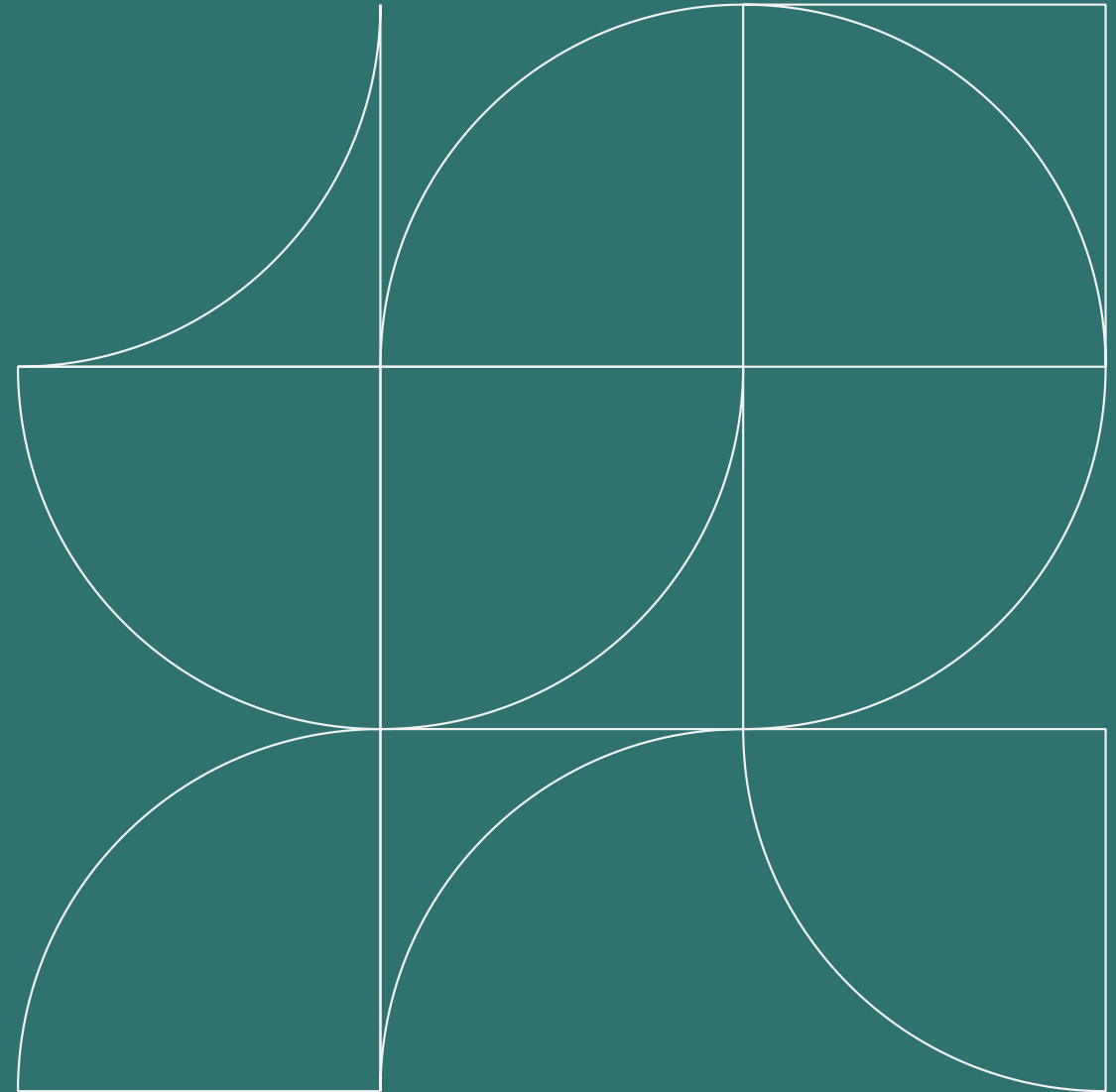
Difficulties in the Modern Workplace

- “Work not requested but suffered or permitted” is considered compensable work time.
- Employee must demonstrate that employer “knows or has reason to believe that [the employee] is continuing to work and the time is working time.”
- No clear answer yet on whether work at home trigger the continuous workday doctrine and require the entire day to be compensable.
 - But some courts have held de minimis time does not trigger the continuous workday.
 - If employee has freedom to use the time for his or her own benefit, argument that continuous workday doctrine does not apply.
 - Clear policies on how to report and record time help.
 - Watch out for emails and texts with managers.

Waiting Time or On-Call/Standby Time

- Engaged to wait versus waiting to be engaged
- Courts ask: (1) whether the wait predominantly benefits the employer and (2) whether the employee is able to use the time effectively for his or her own purposes.
- Other considerations:
 - Frequency of calls to the on-call employee
 - Geographic restrictions on the employee's movement
 - Fixed time limits for response from employee
 - Threat of discipline in the event of a late or no response from on-call employee
 - On-call employee's ability to trade on-call duties with co-workers
 - On-call employee's actual pursuit of or engagement in personal activities while being on call
 - Benefit of the on-call time to the employee
- Callback pay: Keep in mind OT and any reporting time obligations
- Regular rate of pay implications

Special Defenses



The *De Minimis* Doctrine

- Federal
 - “When the matter in issue concerns only a few seconds or minutes of work beyond the scheduled working hours, such trifles may be disregarded.” *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946).
 - Courts have found time ranging from 1-20 minutes to be *de minimis*.
 - But if the time at issue occurs every day, difficult to maintain a *de minimis* defense.
 - Factors: (1) amount of daily time spent on the additional work, (2) administrative difficulty in recording the time, (3) size of the aggregate claim, and (4) regularity of the work.
- California
 - Generally declines to adopt *de minimis* (*Troester*, 5 Cal. 5th 829 (2018)).
 - Healthcare industry
 - Rounding (*Camp*, 84 Cal. App. 5th 638 (2022)), review granted February 1, 2023.

Interns

- Primary beneficiary test
 - No expectation of compensation
 - Training mirrors an educational environment
 - Integrated coursework or academic credit
 - Accommodation of academic commitments
 - Limited duration
 - No replacement of paid employees
 - No promise of employment
- Watch for state-specific requirements
 - For example, in New Hampshire, there is a requirement that programs be registered and approved by the Labor Commissioner



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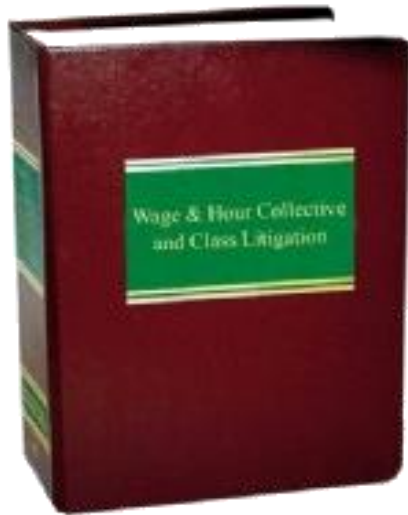
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- 3 | Winning the Battle over Class Action Certification and Collective Action Decertification**
- 4 | The Rise of Mandatory Arbitration Programs**
- 5 | Developing and Defending Exempt Status Classifications**
- 6 | The Employment Relationship**
- 7 | Compensable Work Time**



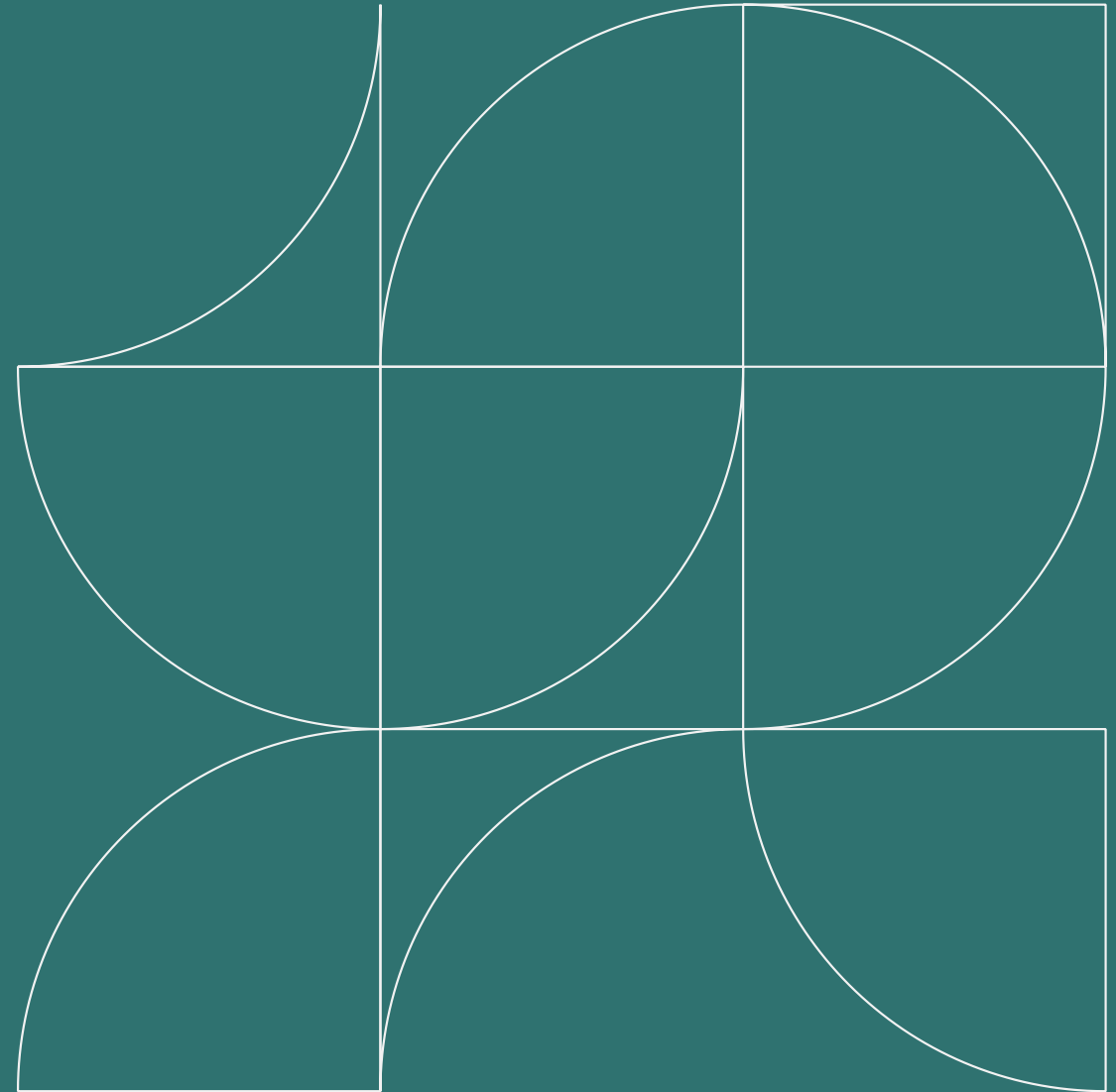
The Authoritative Wage & Hour Litigation Treatise

If you don't already have a copy of the treatise, the book can be purchased here:

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Questions?



Thank You

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