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A MESSAGE FROM YOUR CHAIR

Dear School Law Section Members:

On behalf of the State Bar School Law Section, I cordially extend my best wishes to you and your families this year. It seems as if every year brings new challenges for those involved with educational institutions; however, what we all aim to achieve is that our interests never rise higher than the students of our great State. The hallmark of a great lawyer, whether in the field of education law or another area, is one who listens first, asks necessary questions and attempts to resolve matters in a professional and expedient manner. To this end, our Section is fortunate to have some great mentors that are willing to lend a helping hand and give guidance to those that are new to our area of law or the practice. In recognition of our long legacy of leaders, each year at our annual Retreat we honor individuals upon who we built our Section, most notably this last year our Section presented the "Kelly Frels Lifetime Achievement Award" to Thomas Arnold Garner, Jr. (posthumously), Dorcas Green and Cecil Morgan. Like Kelly Frels, these three individuals practiced school law for many years and exemplified the virtues our Section aims to instill amongst its members: a strong work ethic; good nature; and exemplary legal skills.

Our Section has a great year planned with different events, such as our conference which was held in coordination with the University of Texas, on February 19-20, 2015 at the Renaissance Hotel in Austin. We also have our annual Summer Retreat slated to be held on July 23-25, 2015, which is a great time for our members and families to come together and enjoy each other in a relaxed setting.

In closing, I hope that this year is marked with great success for all. As a new legislative session is upon us, it is incumbent that all of us make our voices heard to ensure that our clients' interests are taken into consideration by our State leaders. With your continued support and attendance at our functions, I know that our Section will continue to be amongst the highest regarded Sections of the State Bar.

Juan J. Cruz
Section Chair 2015-2016

DORCAS GREEN: 2014 KELLY FRELS LIFETIME ACHIEVEMENT AWARD RECIPIENT

By Juan J. Cruz

In a profession often devoid of common courtesy and civility between its participants, Dorcas Green is a shining example that warmth and a kind heart do not signal weakness, but instead signify a tremendous amount of strength and integrity. Further, these traits can lead to an immensely successful career; Dorcas is a named shareholder in Walsh, Anderson, Gallegos, Green and Trevino, P.C., one of the premier education law firms in the state.

Her character is undoubtedly a result of her upbringing; Dorcas is a proud Texan through and through. She was raised in Amarillo along with her five siblings, and her love of the panhandle led her to Texas Tech Law School, where she was on the board of editors of the Law Review. Upon graduation in 1991, Dorcas received the Judge Meade Griffin Award, which should come as no surprise—according to the law school, this award is given to the student who has best used their law school experience to prepare for service to the profession and to mankind through such traits as integrity and perseverance.

Jim Walsh, the co-founder of her firm, told me a story that shows the type of perseverance that Dorcas has. After suffering the worst tragedy a parent can experience—the loss of her only child, Philip—Dorcas and her loving husband of many years, Gary, became involved with "For the Love of Christi," a non-profit in Austin that helps people coping with the grief of losing a loved one. She was faced with every parent's worst nightmare, but instead of retreating, Dorcas found a way to inspire hope in others. What better way to provide service to mankind?

Dorcas has earned the respect of so many of her colleagues over her career, but she is not one to rest on her laurels; she has also dedicated much of her time serving the profession. For example, she served as the Treasurer for the Texas Bar School Law Section, and she has served as Chair of the Council of School Attorneys, which provides support for more than 3,000 school law attorneys. In addition, Dorcas has served on the Legal Assistance Fund Board, which supports districts throughout Texas with the filing of amicus briefs in hundreds of cases. Dorcas has also been a mentor to dozens of attorneys over the years, and is always available with common sense advice tinged with some of her trademark humor.

Some of everyone's favorite *Dorcas-isms* include "saddle your hoss before cussing the boss," and "I can make chicken salad out of chicken #$%*, but you have to give me a chicken first." Her sharp wit has been ever-present, as conveyed through a recollection from Chris Elizalde at Walsh Anderson:

Chris got to take Dorcas to her first board meeting, but the meeting would prove to be quite dramatic due to a recent investigation involving alleged race and ethnicity discrimination by administration against students and employees. Some of the drama centered around the Superintendent's use of the phrase "you people" to refer to a group of Hispanic parents/activists in the community, which came on the heels of a national controversy surrounding Ross Perot's use of the same phrase in comments towards the NAACP. The board members were angry and the public was riled up. Needless to say, the meeting got ugly, and did not finish until close to midnight. What were Dorcas' first words to Chris as she got into her car? "That was FUN!"

Also according to Chris, Dorcas interviewed an employee during the aforementioned investigation and was responsible for asking a tough question: whether the employee had been involved in a sexual relationship with an administrator. The shocked employee, clearly taken aback by the question, replied "No! I'm a Catholic!" Dorcas' response? Words to the effect of "well so was JFK, so answer the question!"

And lastly, according to Paula Maddox Roalson at Walsh Anderson, Dorcas' philosophy on late night board meeting that finished early into the next morning: "the only important decision that should be made at 2 o'clock in the morning is whether to make love or roll back over and go to sleep."

Professionally, as a zealous advocate for her clients, Dorcas has litigated and won cases before the Fifth Circuit and state appeals courts. Her case before the Fifth Circuit, *Nevares v. San Marcos Consol. Indep. Sch. Dist.*, set precedent regarding student discipline issues and constitutional due process, and in *Ruiz v. Austin Indep. Sch. Dist.*, her work helped clarify the grievance process for whistleblower claims.

Dorcas is also a dedicated protector of our state's most valuable resource: its children. Specifically, she has recently authored a guide for school administrators on restricting access to sex offenders visiting campus while maintaining the visitor's civil rights.

Her family, friends, colleagues and clients all love Dorcas Ann Green. There are few people more deserving of the school law section's lifetime achievement award. On behalf of the entire State Bar School Law Section, Dorcas will be sorely missed by her colleagues, as she leaves behind a legacy of goodwill towards others and has set a high bar for others to aspire to attain.

FLSA: The Four-Letter Word That Should Be On Every Employer's Lips

By: Caitlin Holland Sewell [1]

The FLSA (Fair Labor Standards Act of 1938) is the dirtiest of expletives to most employers and their legal counsel—for good reason. The FLSA is immense, convoluted, constantly evolving, and oftentimes counterintuitive. It also packs quite a punch if an employer fails to follow its copious requirements. FLSA litigation has increased exponentially over the past decade as a result of, among other things, employees' increasing awareness of their rights under the statute and the allure of hefty damage awards, including the recovery of attorneys' fees. From 2002 to 2013, the number of FLSA lawsuits filed annually in federal courts steadily increased from 2,305 to 7,764—an increase of nearly 300 percent.[2] In comparison, the number of Title VII lawsuits has decreased by approximately 30 percent in the same time frame.[3] As these numbers demonstrate, it is more imperative than ever that employers—including educational institutions—ensure that their pay practices strictly comply with the FLSA's requirements.

This article will provide a broad overview of the most common hazards for employers, but is by no means a comprehensive study of all of the FLSA's components. Each factual situation is unique, and may be subject to specific requirements, exceptions, or interpretations of the FLSA not addressed in this article.

The Basics

In a nutshell, the FLSA requires employers to: (1) pay qualifying nonexempt employees at an hourly rate of no less than the federal minimum wage; (2) pay nonexempt employees overtime wages for every hour over forty that the employee works during a single workweek; and (3) keep accurate records of the hours worked, regular and overtime wages paid, and certain personal information (such as name, address, identifying number, gender, etc.) of its nonexempt employees.[4] The FLSA applies to all employers (both private and public), regardless of the size of the employer's operation.[5]

The Wage and Hour Division ("WHD") of the Department of Labor was created to administer and enforce the FLSA under the direction of an administrator, who is appointed by the President with the advice and consent of the Senate.[6] The WHD periodically issues Opinion Letters responding to employers' inquiries and clarifying the application of specific FLSA requirements.[7]

The "regular rate" is the cornerstone of the FLSA. The "regular rate" is the hourly rate paid to a nonexempt employee, based on a forty-hour workweek.[8] If an employee is paid on a weekly, monthly, or annual basis,[9] instead of an hourly rate, then the regular rate is determined by dividing the employee's salary by the number of days in the pay period, and then by the number of hours in the workday.[10] This regular rate must match or exceed the federal minimum wage, currently set at $7.25 per hour.[11]

If an employee works more than forty hours during a workweek, then the employee must be paid at his "overtime" rate for every hour in excess of forty.[12] The overtime requirement has two primary purposes: (1) to spread employment by placing financial pressure on the employer to hire additional workers rather than employ the same number of workers for longer hours; and (2) to compensate employees who work "overtime" for the burden of having to do so.[13] An employee's overtime rate is calculated by multiplying his regular rate by one-and-one-half.[14] Consequently, if the employee's regular rate is incorrect, then his overtime rate will also be incorrect.

For example, Theoretical Independent School District ("TISD") pays a maintenance employee an annual salary of $26,880 to work from 7:30 a.m. to 3:30 p.m. for 280 days throughout the year. The maintenance employee's regular rate is $12, and his overtime rate is $18. If he works from 7:30 to 3:30 Monday through Thursday, but works until 6:30 on Friday, then he is owed $54 of overtime pay (3 hours x $18) in addition to his normal weekly wages of $480.

Pitfall No. 1: Determining Which Employees Are Covered By The FLSA.

The FLSA groups all employees into two groups: "exempt" and "nonexempt". Nonexempt employees are entitled to all of the overtime pay and minimum wage protections provided by the FLSA. Exempt employees are not covered by the statute whatsoever. The FLSA provides for numerous exemptions, but the executive, administrative, and professional exemptions are the primary three exemptions applicable to educational institutions.[15] Under these exemptions, an employee's exempt status is determined by: (1) the employee's salary (*i.e.*, "salary-basis test"); and (2) the employee's job duties and qualifications.

The "executive" exemption (otherwise known as the "white collar" exemption) applies to employees who are paid on a salary basis and whose primary duty is the management of two or more individuals.[16] For example, TISD's superintendent qualifies for the "executive" exemption because he is paid a salary and his principal duty is monitoring the performance of district employees, evaluating those employees for promotions, handling employee complaints, determining pay and hours, planning the budget, and performing other related management duties.[17]

The "administrative" exemption applies to employees who are compensated on a salary basis at a rate of not less than $455 per week, whose primary duty is the performance of office or non-manual work directly related to the management or general business of the employer, and whose primary job duty also includes the exercise of discretion and independent judgment with respect to matters of significance.[18] The executive assistant for a large business, or an employee who leads a team of other employees, generally satisfies the duties requirements for the administrative exemption.[19] For example, the executive assistant for TISD's superintendent manages five other secretaries, and her primary job duties include allocating tasks to each of these secretaries, evaluating their performance

on a quarterly basis, and approving their leave requests. As such, the executive assistant probably qualifies for the administrative exemption. In contrast, the office secretary for TISD's high school principal maintains the principal's schedule, files documents, facilitates communications between the principal's office and public, and performs other tasks in accordance with pre-established rules. This office secretary likely does not qualify for the administrative exemption, even if she is paid a salary of more than $455 per week.

Finally, the "professional" exemption applies to employees who are compensated on a salary basis of at least $455 per week, and whose primary duties require advanced knowledge in a field of science or learning that is customarily acquired by higher education.[20] TISD's teachers, librarians, and other highly-educated employees all qualify for this exemption.

Although teachers technically fall under the "professional" exemption, they are unique creatures under the FLSA. Unlike other professional employees, the FLSA does not require teachers to satisfy the salary-basis test.[21] The FLSA defines teachers as any person who is employed by an educational establishment, and who has the "primary duty of teaching, tutoring, instructing, or lecturing in the activity of imparting knowledge."[22] TISD's chemistry teacher, teacher's aid, and substitute teacher all fall under this definition, so long as each of these individuals spend most of their day in a classroom assisting students to learn.[23]

As a practical matter, most employees of an educational institution will be classified as exempt pursuant to the professional, administrative, or executive exemptions. The nonexempt employees will typically be composed of maintenance workers, custodians, cafeteria workers, and other employees who primarily perform manual labor. However, educational institutions should analyze the salary and job duties of each employee—focusing on the employee's actual day-to-day job duties rather than relying on a general description of the employee's position or job title—prior to making a determination of the employee's exempt/nonexempt classification under the FLSA.[24]

Pitfall No. 2: Determining What Amounts Must Be Included In The "Regular Rate"

The regular rate for a nonexempt employee must include *all* remuneration paid to, or on behalf of, an employee as compensation for a work-related duty.[25] The FLSA specifically excludes certain categories of compensation from the regular rate, including: gifts, vacation and sick leave, reimbursement for business expenses, discretionary bonuses, and contributions to a third-party pursuant to a retirement or insurance plan on behalf of the employee.[26] However, deciphering what amounts fall under these exceptions can be a challenge for employers, particularly with respect to gifts and bonuses.

For example, TISD pays a cafeteria worker $100 at the end of each month that the worker has no absences or tardiness. This type of attendance incentive or production bonus must be included in the cafeteria worker's regular rate because it compensates the employee for performing the "duty" of prompt workplace attendance.[27] In contrast, a cafeteria worker who has been employed by the district for ten years is paid an annual stipend of $500 for her years of service. This longevity pay serves no purpose other than to award the cafeteria worker for her long tenure. As such, the $500 constitutes a "gift" and is not included in her regular rate.[28] In sum, if the money requires some performance from the employee, then it should, as a general rule, be included in the employee's regular rate.[29]

De minimis bonuses are an exception to the general rule. An employer may exclude trivial bonus payments from the calculation of the employee's regular rate, if the addition of the bonus payments to the overtime computation "would not increase the total compensation of the employee by more than 50 cents a week" in the period for which such additional payments are made.[30] For example, TISD pays its cafeteria workers a $5 bonus at the end of each quarter (twelve-week period) if the worker has perfect attendance during that time. Since the bonus only amounts to an additional 42 cents per week, the bonus is not required to be included in the cafeteria workers' regular rate for overtime calculations.[31]

Leave time is another area where employers frequently have difficulty maneuvering correctly. Payments for accrued holiday and vacation time are excludable from the regular rate, "regardless of whether they are paid contemporaneously for the days missed or are deferred and paid in a lump sum."[32] For example, if a TISD maintenance worker accrues 10 days of vacation time throughout the year, TISD may pay him the lump sum value of those days at the end of the year—without including that amount in his regular rate. However, courts have held that payments for unused sick leave must be included in the regular rate.[33]

Due to the relative flexibility with respect to payments for vacation and holiday leave under the FLSA, employers may implement "buy-back" programs that allow qualifying employees to cash out their unused vacation time.[34] These programs allow employers to reward employees for good attendance or other accomplishments, and also lawfully avoid the FLSA's limitations on performance-based bonuses. For example, TISD may allow a custodian who earns $10 per hour, and uses less than five vacation days during a six month period, to cash in three of those days for the monetary value of the days ($240) at the end of the period. This $240 "bonus" of sorts does not need to be included in the custodian's regular rate for overtime computations.

Pitfall No. 3: Calculating The Number Of Hours Worked In A Workweek

As addressed at the start of this article, an employer must pay overtime for all hours worked during a single workweek in excess of forty hours.[35] However, the FLSA allows for certain exclusions from the total number of hours that an employee is engaged in work-related activities. As a practical effect, reducing the number of hours worked by an employee also reduces the amount of overtime the employee is entitled to receive.

Preliminary and Postliminary Activities

The most prominent of these exclusions is the Portal-to-Portal Act, which narrows the scope of the FLSA by excluding from an employee's total number of work hours: (1) time spent traveling to and from the workplace; and (2) time spent performing activities that are preliminary and postliminary to the

employee's "principal activities".[36] "Principal activities" are any activities that are part of an employee's regular work in the ordinary course of business, and that are necessary to the business and performed primarily for the benefit of the employer.[37] Further, any activity that is "integral and indispensable" to a "principal activity" is itself a compensable "principal activity".[38]

For example, a TISD maintenance employee parks his personal truck at the maintenance department building, and then walks to the elementary school where he performs his job. The time spent walking to the school is a preliminary activity that does not need to be included in his total work hours.[39] In contrast, if the TISD maintenance employee reports to the maintenance department building to receive instructions from his manager or pick up his tools, then the time spent traveling from the maintenance building to the elementary school is compensable and must be included in his total weekly hours.[40] Although traveling with work equipment may constitute compensable work time, that is not always the case. Courts have routinely held that time spent transporting equipment from the employees' home to the workplace does not necessarily transform the commute into working time.[41]

As another example, TISD requires its cafeteria workers to wear aprons while they are preparing and serving food. TISD is not required to include the time that cafeteria workers spend washing these aprons in their weekly hours, because that is a preliminary/postliminary activity.[42] However, sharpening knives, cutting up fruit and vegetables, and performing other similar preparatory actions—before cooking and serving the food—are integral and indispensable to the principal activities of the cafeteria workers' employment, and therefore, must be included in their weekly hours.[43]

As a final example, if a TISD custodian arrives 30 minutes before his shift starts, and does not perform any work during that period, then TISD is not required to include this idle time in his weekly hours.[44] However, if a TISD custodian spends the first 30 minutes of his shift waiting for a vacuum cleaner to be repaired so that he can begin his duties, this time is included in his weekly hours because the idle time was imposed by the employer and primarily for the benefit of his employer.[45]

Volunteer Work

The FLSA also allows for certain additional exclusions from the regular rate for employees of governmental entities, such a school districts. Under the volunteer exclusion, if a governmental employee volunteers to perform services that are not the same type of job duties he typically performs, and the employee is not paid (or is paid expenses, reasonable benefits, or a nominal fee) to perform the volunteer work, then this time is not included in the employee's weekly hours. For example, if a TISD maintenance worker volunteers to chaperone a school dance and is given a $25 gift certificate, then the four hours spent chaperoning should not be included in his weekly hours.[46] However, if the maintenance worker replaces a light bulb during the dance, sweeps, and performs other duties that he would typically perform in the ordinary course of his employment, then the time does not fall under the volunteer work exclusion and the time must be included in his weekly hours.

Occasional or Sporadic Exclusion

Similarly, under the "occasional or sporadic" exclusion, if an employee of a governmental entity voluntarily performs occasional or sporadic work on a part-time basis, in a different capacity from than the employee's regular duties, then the hours spent performing the occasional or sporadic work are not included in the employee's weekly hours for purposes of determining overtime wages.[47] The term "occasional or sporadic" means "infrequent, irregular, or occurring in scattered instances."[48] Work may be considered occasional or sporadic, even where the need can be anticipated because it recurs seasonally, such as a scheduled sports event.[49]

For example, if a TISD cafeteria worker volunteers to occasionally run the clock at basketball games, then the time spent performing this work may be excluded from her weekly hours under the "occasional or sporadic" exclusion. However, if the cafeteria worker volunteers to work in the concessions stand during basketball games, then the time must be included in her weekly hours for overtime purposes because the concessions stand work is performed in the same capacity as the cafeteria worker's normal job duties.

Meal Periods

A meal period that is used predominantly or primarily for the benefit of the employee, not the employer, may be excluded from the employee's total weekly hours.[50] For example, if TISD requires its maintenance employees to wear their radios and tools during lunch, remain on the premises, and respond immediately to maintenance problems that frequently arise during the break, then the lunch period must be classified as "work-time", not a *bona fide* meal period.[51] Conversely, if TISD maintenance employees are required to remain on the premises and "on call" during the lunch period, but their lunch break will not be interrupted except for emergencies, then the lunch period still qualifies as a meal period that may be excluded from the employees' work time.[52]

De Minimis Time

Similar to the *de minimis* bonus rule, the *de minimis* exclusion permits an employer to disregard "insubstantial or insignificant periods of time beyond the scheduled working hours, which cannot as a practical administrative matter be precisely recorded for payroll purposes."[53] In other words, an employer may exclude small amounts of time from an employee's total hours for the week, if it would be difficult for an employer to accurately keep track of that time.[54] In determining whether time is "*de minimis*", courts look to the amount and regularity of the time at issue, the administrative difficulty of recording the time, and the amount of wages implicated by excluding the time.[55] Periods of ten minutes or less have routinely been deemed *de minimis* for FLSA purposes as a matter of law.[56] However, an employer may not arbitrarily refuse to compensate an employee for hours worked that are part of the employee's fixed or regular working time.[57]

For example, if a TISD custodian is scheduled to work 7:30 a.m. to 3:30 p.m., and he clocks in at 7:25 and clocks out at 3:38 p.m., then TISD may properly record this time as an eight-hour shift for payroll. However, if TISD routinely schedules its custodians to work shifts of 7:30 a.m. to 3:45 p.m.,

then the *de minimis* rule does not allow TISD to pay the custodians for 8 hours of work. The custodian must be paid for the full 8 hours and 15 minutes, and the 8 hours and 15 minutes must also be included in the custodian's total week hours for overtime calculations.

Although an employer is not *required* to pay its employees for excludable time (such as preliminary and postliminary activities, meal periods, and *de minimis* time), it may voluntarily agree to do so.[58] An employer may pay its employees as much overtime as it chooses, at as high of an overtime rate as it chooses, so long as the employer satisfies the FLSA's minimum requirements. Further, an employer's agreement to pay its employees for excludable time—whether that agreement is formed by written contract, custom, or common practice—does not convert this time into compensable "work" time under the FLSA.[59] For example, TISD has paid its custodians for their *bona fide* meal periods since 2000. At the end of the 2009-2010 school year, TISD notified the custodians that it would not be paying wages for their meal times beginning with the 2010-2011 school year. TISD will not be liable to the custodians for failing to pay wages for the lunchtime under the FLSA, so long as the time remains *bona fide* meal periods.

Pitfall No. 4: Underestimating The Consequences Of Violating The FLSA

If an employer violates the FLSA, the impacted employees may bring suit to recover back wages, unpaid overtime, liquidated damages in an amount equal to the unpaid wages, attorneys' fees, interest, and costs.[60] Moreover, the employees are *not* required to accept an employer's proposal to avoid an FLSA lawsuit by paying all wrongfully unpaid wages.[61] The employees may reject the employer's offer of payment, and instead, choose to pursue a legal claim not only for back wages, but also for liquidated damages, attorney's fees, and costs.[62] For example, for years TISD required its custodians to perform duties during their lunch periods, but did not include the meal period in their weekly hours. TISD discovered the error and offered to pay the custodians affected by the error all of their unpaid back wages and overtime. The TISD custodians refused the offer, and recovered a judgment against TISD for the unpaid wages—along with liquidated damages (in an amount equal to the unpaid wages), attorneys' fees, interest, and costs of the suit.

Conclusion

Educational institutions fortunately escape many of the FLSA's requirements because so many school employees are classified as exempt. However, educational institutions must still comply with the vast, complex, and perpetually changing FLSA requirements, even if it is on a less-frequent basis than many other employers. Failure to recognize FLSA issues and navigate the statute correctly can subject educational institutions to FLSA litigation with lightning speed—and result in staggering damage awards. Consequently, current policies should be thoroughly reviewed to ensure FLSA compliance, and legal counsel should be consulted before any changes to pay practices are implemented.

ENDNOTES

1 Caitlin Holland Sewell is an associate attorney at Rogers, Morris, & Grover, L.L.P.
2 Federal Judicial Caseload Statistics, www.uscourts.gov.
3 *Id*.
4 29 U.S.C. §§ 206, 207(a), 211; *see also* 29 C.F.R. § 516.
5 29 U.S.C. § 203; *see also* 29 U.S.C. § 206.
6 29 U.S.C. § 204(a).
7 WHD Opinion Letters are available at http://www.dol.gov/WHD/opinion/opinion.htm
8 29 U.S.C. § 207.
9 The FLSA also provides specific rules for employees who are required to work irregular hour; however, these rules will not be discussed in this article. *See* 29 U.S.C. § 207(f).
10 29 U.S.C. § 207.
11 29 U.S.C. § 206.
12 *Id*.
13 *Walling v. Helmerich & Payne, Inc*., 323 U.S. 37, 40 (1944).
14 *Id*.
15 29 U.S.C. 213(a)(1).
16 29 C.F.R. § 541.100.
17 *Id*.
18 29 C.F.R. § 541.200.
19 *See* 29 C.F.R. §§ 541.203; *McKee v. CBF,* 299 Fed. App'x 426, 429 (5th Cir. 2008).
20 29 C.F.R. § 300.
21 29 C.F.R. §§ 541.303(d), 304.
22 29 C.F.R. § 541.303(a).
23 29 C.F.R. § 541.303(a); *see also* Wage and Hour Opinion Letter, FLSA2008-7 (Sept. 26, 2008); Wage and Hour Opinion Letter, FLSA2005-39 (Oct. 13, 2005) (finding that substitute teachers qualify for this exemption, as long as their "primary duty" is related to teaching).
24 29 C.F.R. § 541.2.
25 29 U.S.C. § 207 (e); 29 C.F.R. § 778.223; *see also Acton v. City of Columbia,* 436 F.3d 969, 977 (8th Cir. 2005).
26 *Id*.
27 *See, e.g., Bibb Mfg. Co. v. Walling,* 164 F.2d 179, 181 (5th Cir. 1947) (holding that an employer's "so-called attendance, incentive, or production bonus of $2 a week" must be included in the employee's regular rate); *Acton*, 436 F.3d at 978 (explicitly rejecting the argument that perfect attendance bonuses need not be included in the regular rate because they do not require performance by the employee but instead contemplate the absence of occurrences).
28 *Moreau v. Klevenhagen,* 956 F.2d 516, 521 (5th Cir. 1992).
29 *Acton,* 436 F.3d at 977.
30 29 C.F.R. 548(e).
31 *See* 29 C.F.R. 548.305(d).
32 *Lemieux v. City of Holyoke,* 740 F. Supp. 2d 246, 254 (D. Mass. 2009); *see, e.g., Chavez v. City of Albuquerque,* 630 F.3d 1300, 1309-10 (10th Cir. 2011); 2006 DOLWH 34 (July 24, 2006).
33 *See Featsent v. City of Youngston,* 70 F.3d 900, 905 (6th Cir. 1995) (holding that payments made for unused sick leave may be excluded from the regular rate); *C.f. Acton v. City of Columbia,* 436 F.3d 969, 977 (8th Cir. 2005)(holding that payments for sick leave must be included in the regular rate); *Chavez,* 630 F.3d at 1309-10 (10th Cir. 2011) (holding that payments for sick leave must be included in the regular rate). The Fifth Circuit has not yet addressed this issue.
34 *See, e.g., Chavez,* 630 F.3d 1300, 1308-10.
35 29 U.S.C. § 207(a).
36 29 U.S.C. § 254; *see also IBP v. Alvarez,* 546 U.S. 21, 27 (2005).
37 *Vega v. Gasper,* 36 F.3d 417, 424 (5th Cir. 1994).
38 *Alvarez,* 546 U.S. at 37.
39 29 C.F.R. § 790.7(f); *see also Griffin v. S&B En'rs & Constructors, Ltd*., 507 Fed. App'x 377, 383 (5th Cir. 2013).
40 29 C.F.R. § 785.38; *see also Griffin,* 507 Fed. App'x at 383.
41 *See, e.g., Chambers v. Sears Roebuck & Co*., 428 Fed. App'x 400 (5th Cir. Tex. 2011)
42 *Mitchell v. Southeastern Carbon Paper Co*., 228 F.2d 934 (5th Cir. 1955) (holding that time spent washing up from carbon ink exposure was not compensable under the FLSA).
43 *Mitchell v. King Packing Company,* 350 U.S. 260 (1956).
44 *Blum v. Great Lakes Carbon Corp*., F.2d 283, 287 (5th Cir. 1969) (holding that idle time before the employees' shift began was not compensable under the FLSA).

45 *Id*.
46 29 U.S.C. § 203(e)(4)(A)
47 29 U.S.C. § 207(p); 29 C.F.R. § 553.30(a)
48 29 C.F.R. § 553.30(b)(1).
49 *Id*. ("An activity does not fail to be occasional merely because it is recurring.").
50 29 C.F.R. § 785.19(a) ("*Bona fide* meal periods are not worktime."); *see also Bernard v. IBP, Inc. of Nebraska,* 154 F.3d 259, 264-65 (5th Cir. 1998).
51 *Bernard,* 154 F.3d at at 265.
52 *See Roy v. County of Lexington,* 141 F.3d 533, 545 (4th Cir. 1998); *O'Hara v. Menino,* 253 F. Supp. 2d 147 (D. Mass. Mar. 31, 2003).
53 *Mireles v. Frio Foods, Inc.,* 899 F.2d 1407, 1414 (5th Cir. 1990).
54 *Id.; see also* 29 C.F.R. § 785.47.
55 *Anderson v. Pilgrim's Pride Corp.,* 147 F. Supp. 2d 556, 563-64 (E.D. Tex. 2001).
56 V*on Friewalde v. Boeing Aero. Operations, Inc.,* 339 F. App'x 448, 454 (5th Cir. 2009) (recognizing that "most courts have found daily periods of approximately 10 minutes *de minimus* even through otherwise compensable.") (quoting *Lindow v. United States,* 738 F.2d 1057 (9th Cir. 1984)); *see also Prince v. MND Hospitality, Inc.,* 2009 LEXIS 61637, at *36 (S.D. Tex. July 20, 2009); *Anderson,* 147 F. Supp. 2d at 563-64, *aff'd,* 44 Fed. App'x 652 (5th Cir. 2002).
57 29 C.F.R. § 785.47.
58 See 29 C.F.R. § 778.320.
59 See 29 C.F.R. §§ 785.19(a); 778.320(b) ("[I]n the case of time spent in activity which would not be hours worked under the Act if not compensated and would not become hours worked under the Portal-to-Portal Act even if made compensable by contract, custom, or practice, the parties may reasonably agree that the time will not be counted as hours worked. Activities of this type include eating meals between hours.").
60 29 U.S.C. § 216(b).
61 29 U.S.C. § 216(b); *see also Owens v. Marstek, L.L.C.,* 548 Fed. App'x 966, 971 (5th Cir. 2013), citing *Pedigo v. Austin Rumba, Inc.,* 722 F. Supp. 2d 714, 720 (W.D. Tex. 2010) ("Plaintiffs are not required to accept such backwages and deductions as compensation for Defendant's violation(s) of the FLSA overtime wage provisions.").
62 *Id*.

IN AN UPCOMING NEWSLETTER:

Profiles on 2014 "Kelly Frels Lifetime Achievement Award" recipients

Thomas Arnold Garner, Jr. (posthumously) and

Cecil Morgan

Education Law in the News

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