

Courts emphasize two factors in determining whether on-call time is compensable working time:

1. The degree to which the employee is free to use the time for his own purposes, and
2. Any agreement that might exist between the employer and the employee.

Waiting time equals “working time” if the employee is “engaged to wait.” Examples of such situations used in the FLSA Regulations include “a stenographer who reads a book while waiting for dictation; a messenger who works a crossword puzzle while awaiting assignments; a firefighter who plays checkers while waiting for alarms; and a factory worker who talks to colleagues while waiting for machinery to be repaired. (Code of Federal Regulations [C.F.R.] § 785.15.

In contrast, an employee is “waiting to be engaged” (and, therefore, not “working” under the FLSA) if he is “completely relieved from duty” and the time period is “long enough to enable him to use the time effectively for his own purposes.” 29 C.F.R. § 785.16 (a).

The amount of time involved matters for both on-call and waiting time. When an employee has more than 20 minutes of down-time which can be used for “the ordinary activities of private life” (for example, eating, sleeping, reading, exercising, watching television, and doing housework), the time does not constitute hours worked under the FLSA.

## Analyzing down-time

Suppose a driver has down-time between routes or during extra-curricular trips? A school district or contractor should begin the analysis with:

- the length of the down-time
- whether the driver is expected to perform any job-related duties during the period, and
- whether s/he is free to do what s/he wanted.

Cases cited in the Indiana case give examples of the second and third bulleted points above. Where interruptions during the down-time are frequent and substantial, where the employer communicates (e.g., by telephone or in person) with the employee during down-time, where the employee’s attention is focused on official matters, the employee is not really “free” during that time.

## The *Hiner* court’s analysis

The Indiana court decided the *Hiner* case in a manner consistent with these down-time principles. The

## Even More FLSA Issues

Among the other issues that can raise FLSA concerns are these: required training programs, the performance of “occasional and sporadic” work, and volunteering by transportation department employees. Stay tuned for discussion of these additional traps for the unwary in the next issue of *Legal Routes*.

court found “that individual plaintiff’s compensated down-time is not considered working time under the FLSA in cases where an individual employee’s down-time exceeds twenty minutes and the employee is not required to perform services for defendant, but is instead free to use his or her down-time for personal pursuits.”

This would have resolved the school district’s argument for set off of this compensated time in the district’s favor if all the drivers who sued were alike. But the court found that some of the drivers could use their down-time for their own purposes, and some couldn’t.

For example, some drivers “performed work-related tasks during their down-time such as transporting special needs students to various locations, picking up students who had missed their bus, making deliveries to students who left items on buses, and talking to office personnel.” Other drivers had testified that “the amount and quality of down-time during extra-curricular trips varied depending upon who was supervising the extra-curricular trip, what requests were made of the driver, and the destination and circumstances of each trip.”

## Lessons from the *Hiner* case

Certainly, this Indiana case offers valuable information about down-time and non-driving work. But it represents well another proposition.

- Like so much in the law, individual determination is essential. What is true for one driver may not be true for all. Be sure that you’re applying the legal guidelines to individual employees. While that may require a burdensome self-audit, the potential for consequences can be well worth the work.
- What if you find violations? Address them by recalculating pay that was due, and pay it in concert with your human resources department. Making wrongs right can serve to contain the spread of contagious FLSA claims.

