



FLSA2018-19

April 12, 2018

Dear **Name\***:

This letter responds to your request for an opinion regarding “[w]hether a non-exempt employee’s 15-minute rest breaks, which are certified by a health care provider as required every hour due to the employee’s serious health condition and are thus covered under the FMLA [Family and Medical Leave Act], are compensable or non-compensable time under the FLSA [Fair Labor Standards Act].” The opinion below is based exclusively on the facts you have presented. You have represented that you do not seek this opinion for any party that the Wage and Hour Division (WHD) is currently investigating, or for use in any litigation that commenced prior to your request.

## BACKGROUND

In your letter, you represent that your clients are employers covered under both the FLSA and FMLA. Your letter explains that several of your clients’ nonexempt employees have provided FMLA certifications from their health care providers “stating that the employees require 15-minute breaks every hour due to their own continuing serious health conditions.” Taking such breaks means that, “in an eight hour shift, these employees will perform only 6 hours of work.” For the purposes of this response, we assume the employees are eligible for protected leave under the FMLA, that they have a serious health condition, and that their recurring 15-minute breaks constitute protected leave under the FMLA. *See* 29 C.F.R. §§ 825.110, 825.113-.115, 825.200, 825.202.

## GENERAL LEGAL PRINCIPLES

The FLSA, as a general matter, requires employers to compensate employees for their work. The FLSA defines “employ” as including “to suffer or permit to work,” 29 U.S.C. 203(g), but does not explicitly define what constitutes compensable work. The U.S. Supreme Court has noted that the compensability of an employee’s time depends on “[w]hether [it] is spent predominantly for the employer’s benefit or for the employee’s.” *Armour & Co. v. Wantock*, 323 U.S. 126, 133 (1944); *see also, e.g., Reich v. S. New England Telecomms. Corp.*, 121 F.3d 58, 64 (2d Cir. 1997) (same).

Short rest breaks up to 20 minutes in length “primarily benefit[] the employer.” *Sec’y of Labor v. Am. Future Sys., Inc.*, 873 F.3d 420, 430 (3d Cir. 2017); *see also* 29 C.F.R. § 785.18 (short breaks “promote the efficiency of the employee”); *Naylor v. Securiguard, Inc.*, 801 F.3d 501, 505 (5th Cir. 2015) (short breaks are “deemed to predominantly benefit the employer by giving the company a reenergized employee”). Thus, consistent with the Supreme Court’s decision in *Armour*, rest breaks up to 20 minutes in length are ordinarily compensable. 29 C.F.R. § 785.18.

In limited circumstances, however, short rest breaks primarily benefit the employee and therefore are not compensable. As relevant to the issues in this letter, for example, the court in *Spiteri v. AT&T Holdings, Inc.*, 40 F. Supp. 3d 869 (E.D. Mich. 2014), confirmed that an employee was not entitled to compensation for frequent “accommodation breaks” (that is, breaks to accommodate the employee’s back pain) that predominantly benefitted the employee. *Id.* at 879. The court noted that 29 C.F.R. § 785.18 does not entitle “an employee to take an unlimited number of personal rest breaks during the day and be compensated for all such breaks, as long as they are less than 20 minutes in duration.” *Id.* This principle aligns with the Supreme Court’s decision in *Armour*, which focused on whether the time predominantly benefits the employer or the employee. *See* 323 U.S. at 133.<sup>1</sup>

As also relevant to this letter, the FMLA provides eligible employees with up to 12 workweeks of job-protected leave each year for certain family and medical conditions. *See* 29 U.S.C. § 2612(a). An employee may take FMLA leave in periods of weeks, days, hours, or even less than an hour. *See* 29 C.F.R. § 825.205. An employee may substitute his or her available paid leave for FMLA leave; otherwise, the FMLA leave may be unpaid. *See* 29 U.S.C. § 2612(c).

## OPINION

As made clear above, rest breaks up to 20 minutes in length are generally compensable because the breaks predominantly benefit the employer. Such breaks are “common in industry,” “promote the efficiency of the employee,” and “are customarily paid for as working time.” 29 C.F.R. § 785.18. The specific FMLA-protected breaks described in your letter, however, differ significantly from ordinary rest breaks commonly provided to employees. As you note in your letter, the 15-minute breaks at issue here “are required eight times per day and solely due to the needs of the employee’s serious health condition as required under the FMLA.”

Because the FMLA-protected breaks described in your letter are given to accommodate the employee’s serious health condition, the breaks predominantly benefit the employee and are noncompensable.<sup>2</sup> The breaks described in your letter resemble the frequent “accommodation breaks” at issue in *Spiteri*, which the court held primarily benefitted the employee and thus were not compensable. 40 F. Supp. 3d at 879-80. This conclusion comports with both regulations and case law, as discussed above, including the Supreme Court’s decision in *Armour*.

The text of the FMLA itself further confirms that employees are not entitled to compensation for the FMLA-protected breaks described in your letter. Indeed, the FMLA expressly provides that FMLA-protected leave may be unpaid. *See* 29 U.S.C. § 2612(c). It provides no exceptions for breaks up to 20 minutes in length. *See id.*

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<sup>1</sup> WHD also has recognized that, although noncompensable meal periods ordinarily must be at least 30 minutes in length, “[a] shorter period may be long enough under special conditions.” 29 C.F.R. 785.19(a). Additionally, if certain criteria are met, unauthorized extensions of employer-authorized breaks need not be compensated. *See* WHD Opinion Letter FLSA2001-16; 2001 WL 1869965 (May 19, 2001); Field Operations Handbook 31a01(c).

<sup>2</sup> This is consistent with the Department’s position in *American Future Systems*, in which it stated that when an employee “requires an accommodation for a medical condition or disability that entails taking repeated short breaks, it is reasonable to conclude that the accommodation renders the break predominantly for the employee’s benefit and therefore non-compensable.” *See* Brief for Secretary of Labor at 20, *Sec’y of Labor v. Am. Future Sys., Inc.*, 873 F.3d 420 (3d Cir. 2017), No. 16-2685, 2016 WL 7034182, at \*10-11.

It is important to note, however, that employees who take FMLA-protected breaks must receive as many compensable rest breaks as their coworkers receive. *See* 29 C.F.R. § 825.220(c). For example, if an employer generally allows all of its employees to take two paid 15-minute rest breaks during an 8-hour shift, an employee needing 15-minute rest breaks every hour due to a serious health condition should likewise receive compensation for two 15-minute rest breaks during his or her 8-hour shift. *See id.*; *see also* WHD Opinion Letter FLSA-1358, 1995 WL 1032460 (Jan. 25, 1995) (when rest breaks are afforded to all employees, “it is immaterial with respect to compensability of such breaks whether the employee drinks coffee, smokes, goes to the restroom, etc.”).

We trust that this letter is responsive to your inquiry.

Sincerely,

A handwritten signature in black ink, appearing to read "Bryan Jarrett". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Bryan Jarrett  
Acting Administrator

**\*Note: The actual name(s) was removed to preserve privacy in accordance with 5 U.S.C. § 552(b)(7).**