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## FLSA Overtime

FLSA overtime claims may involve:

- Employers mistakenly treating employees as "exempt" from the FLSA overtime requirements; and,
- Employers failing to identify, record, or compensate "off-the-clock" hours spent by employees performing compensable, job-related activities.
- Employers failing to include "wage augments" such as longevity pay when calculating an employee's overtime rate.

FLSA recoveries can include compensation in the following types of situations (plus liquidated damages and attorneys' fees):

- Employees may perform a variety of potentially compensable job-related activities during their "off-the-clock" time, such as: taking work home, making/receiving job-related telephone calls at home, working through lunch, working before or after regular shifts, taking care of work-related equipment, job-related "volunteer" work.
- Employees mistakenly classified as exempt (who are really nonexempt) often work regular ("on-the-clock") hours in excess of the FLSA overtime thresholds, as well as compensable "off-the-clock" hours.

Sometimes employers calculate the overtime rates improperly, by not including in the employee's regular rate compensation augments such as "longevity pay," "shift differentials," nondiscretionary bonuses (e.g., educational stipends). The issue here is "time and one-half of what?"

Sometimes employers pay wages "late." The rule is that FLSA wages must be paid "when due," which normally means at the next regularly scheduled pay day. "Late pay" is generally the same as "no pay" under the FLSA. This can be important because an employer that fails to pay wages when due may be liable for liquidated damages (double damages).

Sometimes employers seek to avoid overtime by granting employees "compensatory time" in lieu of cash for overtime hours worked, or "averaging hours" from work period to

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work period, or similar gimmicks. Many such attempts are not permitted under the FLSA.

### **"Overtime" and "FLSA overtime."**

Under the FLSA, "overtime" means "time actually worked beyond a prescribed threshold." The normal FLSA "work period" is the "work week" -- 7 consecutive days -- and the normal FLSA overtime threshold is 40 hours per work week. Some jobs may be governed by a different FLSA overtime threshold. These will be addressed specifically, below. For present purposes, the discussion will assume employees are regular "40 hour per week" employees.

Time actually worked over 40 hours in a work week is "FLSA overtime." Note that some jobs may use the word "overtime" differently, as for example to describe "time worked outside of the employee's normal schedule" or "time worked over 8 hours in a day." An employer may pay employees on any basis it wishes, provided only that actual pay does not fall below the minimum standards required by the FLSA. It is, therefore, permissible for an employer to use the word "overtime" to mean something different from the definition of "overtime" in the FLSA. That, however, does not change the meaning of the word overtime for FLSA purposes, and it is important to restrict the meaning of "overtime" to its statutory definition in determining the FLSA rights of employees. "Time worked outside of normal schedule" may not be the same as "time worked over 40 hours in a work week." Only the latter is "overtime" under the FLSA, and the FLSA governs only pay due for "FLSA overtime" worked.

Thus, under the FLSA overtime rules, "nothing happens" unless and until a nonexempt employee has actually worked more than 40 hours in a work week. Stated another way, if an employee's total hours actually worked in a work week are not more than 40, the FLSA overtime rules are not triggered at all. No FLSA overtime pay is due. If, and only if, total hours actually worked exceed 40 in a work week, then the FLSA overtime rules may come into play.

FLSA overtime pay for nonexempt employees is computed based on all the time the employee has actually worked in a work week. All time actually worked counts, but only time "actually" worked counts. Therefore, the first step in the FLSA overtime formula is to determine how much time a nonexempt employee has actually worked in a work week.

### **Work time.**

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All time spent by an employee performing activities which are job-related is potentially "work time." This includes the employee's regular "on the clock" work time, plus "off the clock" time spent performing job-related activities (which benefit the employer). Potential work is actual work if the employer "suffered or permitted" the employee to do it. An employer suffers or permits work if it knows the employee is doing the work (or could have found out by looking), and lets the employee do it.

With only a few exceptions, all time an employee is required to be at the premises of the employer is work time. All regular shift time is work time. This includes "breaks" (if there are breaks), and "nonproductive" time (for example, time spent by a receptionist reading a novel while waiting for the phone to ring). In addition, all time spent by an employee performing work-related activities that the employer suffers or permits is work time, whether on premises or not and whether "required" or not. Work done "at home" or at a place other than the normal work site is work, and the time must be counted. "Voluntary" work is work, and the time must be counted. "Unauthorized" or "unapproved" work is work and must be counted (provided that the employer knows or should know it is being done and permits the employee to do it). It is the privilege and responsibility of the employer to "control the work" of its employees. If an employer does not wish an employee to perform work, it must prohibit the employee from doing so if it does not wish to include that work time in the required FLSA pay computations. An employer may not accept the benefit(s) of work performed by its nonexempt employees without counting the time in computing pay due under the FLSA. Important FLSA regulations on these points are at 29 CFR §§785.11, 785.12, and 785.13.

While all actual work time must be counted, only actual work time must be counted. "Time not worked" need not be included in computing FLSA pay due. Time not worked includes leave time (for whatever reason), even if leave time is considered "work time" for some other purpose (such as pension accruals, or "overtime" pay due under an employer policy or collective bargaining agreement). Time not worked may also include meal periods (if there are meal periods), whether paid or unpaid, if the employee is actually relieved of active duties during the meal period. For example, assume an employee's regular schedule is 5 shifts per week from 8:00 am to 5:00 pm, Monday through Friday, with an hour per shift for lunch. If the employee actually gets to "take lunch," and works the normal work week (no more, no less), s/he will have 40 hours of actual work time. If, however, the employee takes a vacation day on Thursday, s/he will have actually worked only 32 hours in that work week. If the employee takes Thursday off, but worked a double shift the previous Monday, s/he will have 40 total hours actually worked that work week (and no FLSA overtime pay is due). If the employee works the normal schedule, but works through lunch on Wednesday and Friday, s/he will have 42

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hours actually worked in that work week (and will be owed 2 hours of FLSA overtime pay at time and one-half).

In addition to leave time and meal periods, other potential "time not worked" may include some travel time, and "sleep time." These are treated separately.

### **"Off the clock" work.**

Many FLSA lawsuits have involved employers failing to include time spent by employees performing work activities outside of their normal shifts. Some employees, for example, may "come early" and start working before the official start time of their shifts. Such time counts as work time and must be included in FLSA pay computations, provided only that the employer knew or should have known that the employee was beginning work early (and, of course, to the extent that the employee spent pre-shift time actually performing work activities). Pre-shift "roll calls" are work time. Time spent setting up equipment before the official start time of a shift is work time. Some employees may similarly "stay late" after shifts performing work; this time must be counted as work time, as well. Time spent by an employee cleaning equipment after the close of a shift is work time. Post-shift work time could also include time spent by an employee performing job-related activities "on the way home," as for example a secretary who drops off the day's mail at the post office or delivers some paperwork to a customer or supplier. Some employees take work home. That time may well be work time. Similarly, if an employee is contacted at home by telephone for work related reasons, the time spent is work time (and, of course, if an employee is "called back" to work, the time counts as work time).

### **Training time.**

Most training time is work time. All training time is work time if it occurs during an employee's regular shift, or if it is required by the employer. Training time need not be counted as work time only if it (a) occurs outside of an employee's normal work schedule, (b) is truly voluntary (as in with neither direct nor indirect pressure on the employee to attend, and with no "come back" if the employee chooses not to attend), (c) not directly related to the employee's current job (i.e., the training is designed to qualify the employee to get a new job, and not to enhance the skills used by the employee on the existing job), and (d) the employee does no other work during the training.

### **Travel time.**

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There are some "grey areas" about when the FLSA requires travel time to be treated as working time. However, as a general rule, "home to work" and "work to home" travel time is not work time, and this is true even if the "commute" is longer than normal, to or from a different work site than normal, or the employee uses a company vehicle for the trips. This assumes that the employee is performing no other work activities while commuting. Time spent by an employee writing a report is work time, even if it happens to occur while the employee is riding on a bus (or airplane) to or from work. Travel time which is "all in a day's work" is work time. Usually, this means that travel time is work time if it occurs between when the employee first arrives at the first work site and before the employee leaves the last work site at the end of the work day. The first work site is the place where the employee first performs work activities. For example, an employee who travels to the office, picks up equipment, then goes to a work site to perform the day's activities is working from the time s/he first arrives at the office. Picking up the equipment needed to do the day's activities is the first work activity of the day, and therefore the office is the first work site of the day.

### **Meal periods.**

Meal periods need not be counted as work time if they are at least 30 minutes long and the employee is relieved from active duties during the meal period. An employee who "works through lunch" is working and that time must be counted. An employee who "eats a sandwich at the desk," or is required to monitor a machine, is working through lunch. However, a meal period need not be counted as work time if the employee is merely expected to "remain available" during the meal period but is otherwise relieved of active work duties. So, for example, a meal period may be time not worked even if the employee is not permitted to leave the facility, or expected to remain in uniform.

### **Sleep time.**

For employees who work shifts of 24 hours or more, the FLSA permits a "sleep time exclusion" of up to 8 hours, if there is an "agreement" with the employees about this and adequate sleeping facilities are provided. All time during which an employee is required to perform active duties must be counted as work time, and if in reality the sleep period is interrupted to the point where the employee does not have the opportunity for at least 5 hours of sleep the entire time must be counted as working time. No sleep time exclusion is permitted for employees whose shifts are less than 24 hours. Home work. As noted, "off premises" work time must be counted as work time. However, some employees routinely perform work activities off premises, at home and outside of their normal shift times. There may be peculiar practical difficulties in an employer's ability to control this kind of work. There is a special FLSA rule which permits employers and

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employees to agree to a predetermined amount of time which will be credited as work time under these circumstances. Essentially, this special rule permits the employer and employee to estimate a realistic average amount of off-premises time which is likely to be spent by the employee performing work activities on a "week in, week out" basis. The agreement must be "real," and not just imposed by the employer, and it must be set up before the work is performed. The amount of time must be estimated after consideration of "all pertinent facts."

### **Alternative work periods.**

Most nonexempt employees are "40 hour per week" employees, entitled to FLSA overtime pay if, when, and to the extent they have actually worked more than 40 hours in a work week. There are, however, exceptions to this general rule, two of the most important of which may apply to medical care providers, and government police officers, fire fighters, and (some) EMS employees. For these employees, the FLSA permits (but does not require) alternatives to the standard 40 hour per work week FLSA overtime threshold.

Nonexempt *medical care providers* working at medical care facilities may be paid based either on the standard 40 hour work week or on so-called "8/80" systems. If the medical employer chooses, it may pay these employees FLSA overtime for actual time worked in excess of 8 hours per day, or 80 hours every two weeks (whichever is better for the employee), instead of for hours worked in excess of 40 hours per work week.

### **Police officers, fire fighters and EMS employees.**

Government police officers, fire fighters, and (some) EMS employees may be paid either on the standard 40 hour work week or on so-called "7(k)" systems (which are also sometimes called "Garcia cycles"). 29 USC §207(k). In 7(k) systems, FLSA overtime pay is due if, when, and to the extent a police officer, fire fighter or EMS employee actually works more than the number of hours specified by the Department of Labor as applying to a particular "work period." For example, under a "14 day 7(k) work period" system a police officer is due FLSA overtime pay only if, when and to the extent actual hours worked exceed 86 in the 14 day work period. Under a "28 day 7(k) work period" a fire fighter is due FLSA overtime pay only if, when and to the extent actual hours worked exceed 212 in the 28 day work period. Permissible work periods may be from 7 to 28 days, and the FLSA overtime thresholds applicable to particular work periods are set out in a chart published in the FLSA regulations. 29 CFR §553.230.

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A government employer may choose to use a 40 hour work week or a 7(k) system at its option, and may use a 7(k) system for FLSA compliance purposes even if it actually pays its employees on the basis of 40 hour work weeks. To use a 7(k) system for FLSA purposes requires only that the employer establish such a system (for example, by issuing a policy statement to that effect), and that the affected employees actually work on a schedule which repeats and recurs on some multiple of between 7 and 28 days. Which particular 7(k) threshold applies depends mostly on what the employees' schedule is. For 7(k) systems, pay computations mostly follow the regular FLSA rules, with the "work period" being substituted for the normal "work week."

Alternative 7(k) work period systems are not available to private sector (non-government) employers, which (with the exception of medical care personnel) must pay nonexempt employees based on 40 hour work weeks. For government employers, 7(k) systems are available for "sworn" fire fighters (even if their primary work is medical) or police officers. In some unusual situations "non-sworn" EMS employees may possibly qualify for 7(k) "law enforcement" pay plans.

### **The work week standard.**

The FLSA uses the work week as the standard for computing overtime pay due, and each work week stands alone. Thus, a nonexempt employee's time worked "vests" at the end of each work week (or work period). Work time may not be "averaged" from work week to work week. For example, an employee who works 44 hours in week one, followed by 36 hours in week two, is entitled to 4 hours of FLSA overtime pay for week one and may not be paid based on an "average" of 80 hours in the two week period. (Two exceptions to this might be for some medical care employees, and government police officers and fire fighters, who are permitted to be paid on special "alternative work periods.")

Similarly, time worked in one work week may not be offset against time off in some other work week (except for some government employees). An employer may not avoid paying FLSA overtime pay due in one work week by granting time off in another.

However, nothing in the FLSA guarantees any employee any particular amount of work time, or requires any particular schedule of work. An employer may "adjust schedules" within a work week to avoid an employee working FLSA overtime. For example, if nonexempt employees work "extra" time early in a work week, the FLSA permits the employer to "send them home" later in the same work week so that total hours actually worked in that work week will not exceed 40. This raises no FLSA issues, since "nothing happens" under the FLSA overtime rules until and unless total hours actually worked in

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a work week exceed 40. Stated another way, the only number that matters is the time worked as of the last minute of the last day of the work week (when work time "vests"). How an employer chooses to schedule an employee during the work week is simply not an FLSA concern, since that does not affect the pertinent FLSA computations.

### **Wages must be in cash.**

For non-government employees, FLSA wages due must be paid in money. "Compensatory time" off in lieu of cash for FLSA overtime wages due is not permitted in private sector employment. This rule is limited to wages for FLSA overtime work. How an employer chooses to compensate employees for hours worked up through 40 in a work week when no FLSA overtime is worked is not really an FLSA concern (except for the minimum wage laws). For example, assume a nonexempt employee is regularly scheduled to work 37.5 hours per work week, and actually works 40 hours in a work week. Since total time worked did not exceed 40 hours, the FLSA overtime rules have not been triggered. Therefore, there is no FLSA requirement about how hours 37.5-40 are paid (except for the minimum wage laws). An employer may compensate for these hours pretty much as it wishes, in wages at the regular rate, or some other rate, or in time off later, or for that matter with nothing extra at all (provided the minimum wage laws are adhered to).

### **The Regular Rate**

FLSA overtime pay is time and one-half the employee's "regular rate" of pay. Therefore, to compute FLSA overtime pay due requires knowing what the regular rate is. In most cases, this is a straightforward inquiry, but in some situations the FLSA employs some peculiar arithmetic used to determine the regular rate.

The regular rate is defined as the hourly equivalent of all straight time compensation received by an employee for work. The FLSA formula is that an employee's regular rate is the total "straight time" compensation received by the employee "for work," divided by the number of hours that money is intended to compensate.

If an employee's straight time pay is a purely hourly wage, then that wage is the regular rate. However, in some employment situations, straight time pay is not simply an hourly rate. A nonexempt employee may be paid a "salary," and there may be additional compensation received by an employee which the FLSA requires be included as part of the regular rate.

### **"Salaried nonexempt employees."**

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The FLSA does not require that nonexempt employees be paid hourly. Nonexempt employees may be paid by means of a salary. Salaried nonexempt employees are still entitled to FLSA overtime pay if, when and to the extent that they actually work more than 40 hours in a work week. FLSA overtime pay is time and one-half of the employee's regular rate of pay. When a nonexempt employee is paid by a salary, the amount of the salary must be converted to its hourly equivalent to determine the regular rate of pay (time and one-half of which is the employee's FLSA overtime rate of pay).

The FLSA formula for determining the regular rate is to divide the total amount of straight time compensation received by the employee "for work" by the number of hours that compensation was intended to pay for. For example, if nonexempt employee "A" is paid a salary of \$400 per week for a normal 40 hour work week, the hourly equivalent is \$10 per hour. However, the FLSA does not prescribe how many hours per week of straight time a salary must be intended to compensate. This is left to the market, and the arrangements between employers and employees. Thus, for example, a nonexempt employee ("B") may be hired at a salary of \$400 as straight time compensation for a normal work week of 50 hours. In that situation, the hourly equivalent of this salary is \$8 per hour. If the employee ("C") is hired at a salary of \$400 per week for 37.5 normal straight time hours per week, the hourly equivalent is \$10.67 per hour.

Assuming that the salary is the entire compensation received by the employee for work, the employee's regular rate of pay -- and therefore the FLSA overtime rate of pay -- varies depending on what the salary is "for." Assume the hypothetical employees described above actually worked 55 hours in a work week -- 15 FLSA overtime hours. Employee "A's" regular rate is \$10 per hour, which paid straight time for 40 hours. S/he is due \$15 per hour for each FLSA overtime hour, or an additional \$225, for total pay due of \$625.

Employee "B" is different. S/he is also due time and one-half for 15 FLSA overtime hours worked, but s/he has "already" been paid the straight time rate of \$8 per hour for the first 50 hours. S/he is therefore due "the difference" between the \$8 of straight time already paid for these hours and the time and one-half overtime rate of \$12 per hour for these hours, or an additional \$4 per hour for 10 hours, or an additional \$40. S/he has been paid nothing for hours 51-55, and is due \$12 per hour for each of these. Thus, total wages due hypothetical employee "B" are \$400 + \$40 + \$60 = \$500. This kind of regular rate computation is sometimes, but inaccurately, known as a "half time" pay system.

Employee "C" has a regular rate of \$10.67 per hour, and therefore an FLSA overtime rate of \$16 per hour. The salary did not compensate for any of the FLSA overtime hours

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(hours 41-55), so s/he is entitled to an additional \$240 for these. However, s/he also worked hours 37.5-40, which are not FLSA overtime hours. In a work week when employee "C" did not work any FLSA overtime, how s/he was paid for hours 37.5-40 would not be an FLSA concern at all. However, an FLSA regulation requires that in FLSA overtime work weeks, the employee must be paid "all straight time due" in addition to all FLSA overtime due. Absent some peculiar employment arrangement governing payment for hours 37.5-40 (and no such arrangement exists in the hypothetical), employee "C" must be paid straight time for those, or 2.5 hours at \$10.67 per hour = \$26.68. Total pay due employee "C" is therefore  $\$400 + \$26.68 + \$240 = \$666.68$ .

There is another possible way that nonexempt employees may be paid on a salary, and that is if a salary is intended to compensate at straight time for "all" hours worked by the employee, whether "few or many." This type of straight time pay arrangement is permitted under the FLSA for nonexempt employees whose hours of work vary from work week to work week (and typically when their normal hours vary so that in some weeks they work fewer than 40 hours). Under these circumstances, a salary designed to compensate at straight time for "all" hours worked is called a "salary for fluctuating hours." On this kind of pay plan, the FLSA regular rate arithmetic formula is the same, but it results in some unusual computations.

To determine the regular rate for a nonexempt employee paid a salary for fluctuating hours requires dividing the salary amount by how many hours the employee actually worked in the work week. (Since the salary for fluctuating hours compensates at straight time for "whatever" number of hours were worked, the number of hours it was "intended" to compensate depends on how many hours were in fact worked.) Since (almost by definition), the hours actually worked by such an employee may vary from week to week, the employee's regular rate of pay may also vary from week to week. The more hours were actually worked, the less the regular rate is. For example, if employee "D" receives a \$400 "salary for fluctuating hours," and worked 60 hours in some week, the regular rate for that week is \$6.67. However, if "D" worked 48 hours in the following week, the regular rate for that week would be \$8.33. In the first week, "D" is entitled to 20 hours of FLSA overtime pay, at time and one-half the regular rate of pay for that work week. Time and one-half \$6.67 is \$10. However, the salary has already compensated "D" at straight time for each hour worked. What "D" is due is "the difference" between the \$6.67 regular rate for that week and the \$10 FLSA overtime rate for that week, for 20 FLSA overtime hours, or an additional \$3.33 per hour for 20 FLSA overtime hours, for a total of  $\$400 + \$66.60 = \$466.60$ . In the second week, when "D" worked 48 hours, s/he is due time and one-half of the regular rate of \$8.33 for each of the 8 FLSA overtime hours worked. Since s/he has already been paid \$8.33 for each

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of these FLSA overtime hours in the salary, what is due is an additional \$4.16 for each FLSA overtime hour. Thus, for the 48 hour week, "D" is due  $\$400 + \$33.28 = \$433.28$ . A salary for fluctuating hours is another variation of the type of FLSA overtime pay which is sometimes (but inaccurately) called a "half time" system. Valid wage plans using salaries for fluctuating hours are rare.

### **Wage augments.**

Many nonexempt employees receive various wage augments in addition to their base wages. This may include items such as shift differentials, longevity pay, attendance pay, or "bonuses" of various kinds. Under the FLSA, any money received by an employee "for work" is part of the employee's regular rate of pay. Wage augments such as those listed are considered compensation for work, and must therefore be factored into the regular rate (on a "pro rata" basis).

Sometimes, this is easy to compute. For example, assume that a nonexempt employee is paid \$10 per hour, plus \$.50 per hour shift differential. For that work week, the regular rate is \$10.50 per hour, time and one half of which is \$15.75. In other circumstances, however, the FLSA arithmetic is more complicated. Assume, for example, a \$10 per hour employee who also receives an "extra" \$500 per year as longevity pay. That \$500 per year is considered compensation for work and is part of the employee's regular rate of pay. The difficult question is how the \$500 should be allocated to each hour actually worked by the employee; by how much per hour the longevity pay bonus increases this employee's regular rate. The answer is that the \$500 has to be allocated on a pro rata basis among "all" the hours the employee actually worked during the period when the bonus applied (since the longevity pay was "earned" for "all" the hours the employee worked). Since the longevity pay bonus covered a year's worth of work, it would be allocated among all the hours the employee actually worked in the year to which the bonus applied. This, of course, makes it impossible to determine how much to allocate per hour until the total hours worked by the employee over the entire year is known. Therefore, at the end of the year, the \$500 should be allocated to all the employee's work hours, and then the employee's FLSA overtime pay recomputed for each work week when FLSA overtime was worked using the adjusted regular rate. The employer should then tender the employee the "increase" in FLSA overtime pay attributed to the regular rate adjustment. Of course, for many employers this can be a daunting administrative task, and it may be questioned whether the cost of performing these computations will exceed the value of the exercise. Because of this, some employers may simply allocate the wage augments to the affected employees' normal "straight time" work weeks, increasing the regular rates accordingly even though ultimately that

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may result in employees receiving slightly more than the strict FLSA formula would require.

Most bonuses are required to be included in the employees' regular rates. The only exception is for bonuses which are entirely "discretionary" with the employer. A bonus is not discretionary if the employment policy is that an employee is entitled to the bonus if s/he meets certain predetermined requirements, such as successfully making a "quota." Nor are bonuses discretionary if they depend on the employer meeting predetermined goals, such as "profit sharing" triggered by a set revenue figure.

Payments to employees as reimbursements of out-of-pocket expenses are not required to be included in the regular rate, since they are not compensation "for work." For example, distinguish between educational "stipends" such as money paid to employees who have attained a specified degree, and "tuition assistance" programs in which the employer pays all or part of the costs of courses successfully completed by employees. The former is "compensation for work," includable in the regular rate. The latter is not, since it is a reimbursement for an expense. Extra money paid to employees to offset the cost of purchasing or dry cleaning work uniforms is not required to be included as part of the regular rate. Extra money paid to employees to compensate them for the time they may spend cleaning work uniforms is compensation for work and part of the regular rate. Mileage payments for the employee's use of a personally owned vehicle are reimbursements, not compensation for work.