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Give Me A Break: DOL Regulations Need Updating to Afford Workers Desired Flexibility

Labor and Employment

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The views expressed are those of the authors in their personal capacities and not in their official/professional capacities.

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I. Introduction

Soon after the Fair Labor Standards Act (FLSA)¹ was enacted in 1938, the U.S. Department of Labor (DOL) began to issue interpretive regulations explaining its view of the wage and hour obligations it imposes on employers. Many of those interpretive regulations have remained functionally unchanged for nearly eighty years, with no process or directive in place requiring that they be periodically reviewed and updated.² Technology, the American workforce, and the nature of employment relationships have all changed drastically in the intervening decades, but DOL's regulations have not kept pace. In particular, the regulations fail to take into account the substantially increased preference of modern workers for substantial workplace flexibility together with the technological changes that have made such flexibility eminently possible—if only DOL's regulations would allow it. It is high time that DOL conduct a stem-to-stern review, with the needs and structure of the modern workforce firmly in mind, for the purpose of identifying regulations that should be eliminated or revised.

This white paper makes the case for an across-the-board update of DOL's wage and hour interpretive regulations, using as an example an antiquated 1940 regulation that is still on DOL's books today concerning the compensability of elective employee breaks. Nearly 80 years have passed since the Department first published its employee break regulation. This paper contends that—as with many other DOL interpretive rules—the presumptions about America's work environments on which the regulation was founded are no longer valid, and the black-and-white lines it purports to draw make little sense today as a matter of law or policy. DOL could and should undertake an overhaul of its interpretive regulations, taking into account both changed worker preferences and the realities of modern working environments, with an eye toward creating the right incentives for both employers and employees to get that what they want out of their working relationships.

II. Rest Breaks and the Work Environment: 1940 to Present

When Congress passed the Fair Labor Standards Act of 1938, the debut of the first television set at the New York World's Fair was still a year away. Many homes did not have telephones or most of the features of modern plumbing, and nearly half the labor force worked in the manufacturing or agricultural industries. Simply put, the American workforce of 1938 had little in common with the

¹ Fair Labor Standards Act of 1938, Pub. L. No. 75-718, § 2(b), 52 Stat. 1060 (1938).

² Section 213 of the FLSA provides that the Act's statutory overtime exemptions shall be “defined and delimited *from time to time* by regulations of the Secretary.” 29 U.S.C. § 213 (emphasis added). DOL studiously ignored this command regularly to update the overtime exemptions for more than 50 years, until Labor Secretary Elaine Chao finally revised them in 2004. Among other things, that update eliminated such obsolete and functionally meaningless terms from the regulations as “leg men,” “straw bosses” and “key-punch operators.” Notably, no similar comprehensive update has been done with respect to the rest of the Department's wage and hour regulations.

workforce of 2018. To be sure, some things have stayed the same: most workers still commute from home to a designated worksite, perform the tasks for which their employer compensates them, and then return home. Eighty years after the FLSA first went into effect, however, the way that workers get to and from work, the specific tasks that they perform, and the manner in which they accomplish them have all changed drastically. And, of course, telecommuting, jobs that involve local travel throughout the day, and independent contractor relationships—all of which depart from these traditional norms—are substantially on the rise.

The FLSA requires that hourly workers be paid minimum wage and overtime, but it does not itself define what qualifies as “hours worked,” which is the key concept to which its compensation requirements apply. It has long been understood, for example, that time an employee spends commuting to work is not “hours worked” and thus is not compensable. On the other hand, if an employer requires an employee to leave his primary worksite during the work day to perform some off-site task, the time that the employee spends traveling to and from the location of the off-site task qualifies as “hours worked” and must be treated as compensable time. Gray areas, however, abound. And unlike the FLSA’s overtime exemptions, which expressly vest DOL with authority to define and delimit the exemptions by regulation, Congress has not provided DOL with legislative rulemaking authority to define what constitutes compensable hours worked.

From the very earliest days of the FLSA, however, DOL has expressed its views on what qualifies as compensable time through interpretive regulations, opinion letters, and other guidance.³ And courts confronted with employment disputes involving issues of compensable time have, for better or worse, frequently looked to DOL’s interpretive regulations and guidance to interpret and apply the FLSA to the cases before them.

One of the specific questions that DOL addressed in its first wave of interpretive regulations in 1940 was the circumstances under which hourly employees must be paid for breaks taken during the workday, that is, between the time the employee reports to work and the time the employee leaves work at the end of the day. In its early interpretive regulations, the department said two things on the subject of such breaks. First, the department said that “[p]eriods during which an employee is completely relieved from duty and which are long enough to enable him to use the time effectively for his own purposes are not hours worked.” 29 C.F.R. § 785.16. This interpretation states the obvious: time that an employee is not performing any work for the employer, and that the employee is instead devoting to his or her own purposes, are not hours “worked.” But the department then also said the following: “Rest periods of short duration, running from 5 minutes to about 20 minutes, are common in industry. They promote the efficiency of the employee and are customarily paid for as working time.” 29 C.F.R. § 785.18. Based on that interpretive stance, it quickly became understood that it was DOL’s position that if an employee took a break of 20 minutes or less during the workday, that time was automatically deemed “compensable” under the FLSA.

³ See, e.g., 29 C.F.R. §§ 785.14–17 (waiting time); *Id.* § 785.38 (travel time).

Are these two interpretive rules truly compatible? If an employee is “completely relieved from duty” for 15 minutes and allowed to “use th[at] time effectively for his own purposes,” the first interpretive rule would seem to deem that time not to be “hours worked.” The second interpretive rule, however—at least as it has long been understood— would seem to deem the break time automatically compensable simply because it is less than 20 minutes long. The only way to reconcile these seemingly conflicting interpretations is by reference to the foundational presumptions underlying the rule. First, that certain employers (particularly ones that require significant manual labor from their employees) directly and substantially benefit from their employees taking periodic short breaks for the purpose of maintaining labor productivity. Second, that those same employers often *require* their employees to take those short breaks in order to secure those productivity gains. And third, that a break of 20 minutes or less could not effectively be used by an employee for their own purposes.

Those presumptions may have made sense in the 1940s, when the majority of the workforce was engaged in manufacturing or agricultural jobs. But in today’s service economy, the first two presumptions certainly are no longer true with respect to the vast majority of jobs. To be sure, some employers may still want their employees to take rest breaks for purposes of maintaining productivity, and some of those employers may even mandate such breaks. And where an employer mandates short breaks for purposes of maintaining productivity, it makes perfect sense to deem that break to be primarily for the employer’s benefit and to accordingly require that the time be compensated. In today’s economy, however, that situation is the exception, rather than the rule. Moreover, there are clear limits even to the 1940s compensability rationale. It has always been understood, for example, that a 30 minute lunch break is non-compensable, even if it is mandated by the employer and even if it is necessary to an employee’s continuing productivity, because 30 minutes is adequate time for an employee to use for their own purposes—including eating lunch, which has always been understood to be for the employee’s own purposes. An employer may substantially benefit from such a break—famished employees may prove not to be the best workers—but the employee’s interests have always been understood to predominate during a period of time of sufficient length for the employee to use the time for their own purposes, thus rendering the time non-compensable.

This, then, brings us to the last presumption underlying the department’s seemingly black-and-white rule on rest breaks, which is the notion that an employee cannot use a break of 20 minutes or less for their own purposes. That may have generally been true in 1940, when the very idea of a smartphone would have properly been considered science fiction. But modern workers are substantially differently situated, as they unquestionably have the means to effectively use even short rest periods purely for their own convenience. In the 21st century, workers can video chat with their doctor, text their child’s teacher, call their cell phone carrier to resolve a billing dispute, monitor the security of their home with an app, or order lunch delivery with the click of a button, all through their smart phone’s touchscreen. In other words, in the modern world it is unquestionably the case that employees can use breaks of less than 20 minutes for their own purposes. Moreover, as will be

discussed in more detail below, modern employees greatly value being provided the opportunity and flexibility to fluidly transition from tending to work needs to handling personal matters.

The department’s ancient interpretive rule, however, ignores the transformation of both the capabilities and the desires of the modern work force, seemingly telling employers that if they do allow their employees to take short breaks from work for the purposes of attending to personal matters, the employer must pay the employees for the breaks. Such a rule finds no foundation in the text of the FLSA, ignores the realities of modern working environments, and creates all the wrong incentives for both employers and employees to get that what they want out of their working relationships. It is high time for an update to DOL’s regulations that takes into account modern work environments, modern technology, and the preferences of modern workers.

III. Early Regulation of “Rest”

Mitchell v. Greinetz,⁴ a 1956 case that DOL incorporated into section 758.18, exemplifies the rationale that initially supported the interpretive rule. Paul Greinetz owned a business that manufactured cloth accessories on hand-operated looms. The work was “monotonous and tiring,” requiring “coordination” and “constant attention.”⁵ In fact, the work was so exhausting that many of Mr. Greinetz’s employees eventually “broke down” from the strain from a “regular eight hour day.”⁶ So Mr. Greinetz started giving his workers a midmorning and midafternoon break to rest their hands and their minds. Although optional at first, Mr. Greinetz eventually made these breaks mandatory “upon observing the beneficial effects,” which included increased worker efficiency and floor production.⁷ However, he refused to pay his workers for these breaks—breaks that they could not refuse to take and that afforded them the opportunity to do little more than use the restroom and have a drink. The Secretary of Labor challenged this practice as violating the FLSA’s minimum wage requirements.⁸

The district court held for Mr. Greinetz, but on appeal, the Tenth Circuit reversed.⁹ In holding that the break time was compensable, the court was most taken by the fact that employees could not use the time for their own purposes, and could not refuse the rest periods even if they wished to work more to increase their earnings. Meanwhile, the benefits to Mr. Greinetz were “substantial,” which is

⁴ *Mitchell v. Greinetz*, 235 F.2d 621 (10th Cir. 1956).

⁵ *Id.* at 622.

⁶ *Id.* at 622–23.

⁷ *Id.* at 623. Mr. Greinetz “testified that the breaks . . . enabled four of the women who were the poorest workers to become the best workers in the ship within two or three weeks [and] . . . that these women produced more in the six and one-half hour day than the young men employed before the war ever did in eight hours.” *Id.*

⁸ *Id.* at 622.

⁹ *Id.*

the reason why he made them mandatory.¹⁰ This is the balance of benefits that 29 C.F.R. § 785.18 has in mind in requiring that “rest periods of short duration” to be “counted as hours worked.”

IV. Changing Times and a Case in Point: American Furniture Systems

In a recent Third Circuit case, *Secretary of the United States Department of Labor v. American Future Systems, Inc.*, 873 F.3d 420 (3rd Cir. 2017), an employer offered its employees the flexibility to take a personal break “at any time, for any reason, and for any length of time, and [even to] leave the office when they are logged off.” 873 F.3d at 423. Deferring to DOL’s interpretive regulation on breaks, the court held that the employer was required to pay for all employee-directed breaks taken pursuant to this policy that were less than 20 minutes in length. In so holding, the court rejected the employer’s argument (ironically based on *Greinetz*) that a “facts and circumstances” test should be applied to each break to determine whether the employee could effectively use the break for their own purposes, holding that the Department’s black-and-white interpretive rule precludes the application of such a test. The Third Circuit labeled the employer’s reliance on *Greinetz* “misplaced,” finding that “section 785.18 likely referred to it [only] because it explicitly endorsed the [Wage and Hour Division’s (“WHD”)] interpretation.”¹¹

The effect of the Third Circuit’s holding, however, and of DOL’s underlying interpretive rule, is to greatly discourage employers from offering their employees the right to take elective personal breaks.¹² Most employers functioning in a competitive environment simply cannot afford to pay their employees for non-productive personal breaks. That is particularly true of entirely discretionary personal breaks that may be taken at any time and for any reason, and as often as an employee desires. Yet as the next section elaborates, modern employees highly value workplace flexibility that empowers them with greater control of their own time by affording them discretion to take breaks as needed to attend to personal matters.

With few exceptions, federal law does not require employers to offer rest periods or break time.¹³ Yet 29 C.F.R. § 785.18 tells employers that if they *do* offer employees a break, they must compensate

¹⁰ *Id.* at 625.

¹¹ *Id.* at 431. The original interpretation, issued in a June 10, 1940 press release, declared “that short rest period up to an including twenty minutes should be compensated.” *Greinetz*, 235 F.2d at 624. In December of 1955, the interpretation was changed to reflect the current “running from 5 to 20 minutes” language. *Id.*

¹² This paper does not undertake to defend all aspects of American Future Systems’ rules regarding employee breaks and compensable time. Bathroom breaks, for example, are an inherent part of all human activity including work, and in the view of the authors of this paper should always be compensated.

¹³ An example of when federal law *does* require employers to offer break time is the requirement that nursing mothers be given time to express milk. However, this law does not require employers to compensate employees for these breaks. 29 U.S.C. § 207(r). Some states—most notably California—do have detailed mandatory rest break requirements. The FLSA does not preempt such laws, and a change in DOL’s interpretive regulations would not directly affect

them for that break time. Employers who realize tangible benefits from their employees' breaks—employers like Mr. Greinetz—can be expected to continue to routinely offer and perhaps even require break time. But what about breaks to field personal phone calls or to surf the internet? Such breaks have virtually no benefit to the employer and are distinctly for the employee's benefit. Because most employers cannot afford to pay hourly employees to take personal breaks lasting up to twenty minutes, they simply do not allow them.

If *American Future Systems* and DOL's underlying interpretive rule hold sway, it is thus highly unlikely that employers will make flexible personal break policies of this nature available to their employees at all. Workers may want such policies, and employers may want to offer them, but DOL's archaic rule simply renders them prohibitively expensive. With few exceptions, federal law does not require employers to offer personal breaks of any kind. And faced with a choice between not offering flexible personal breaks or allowing them but having to pay for them, the economic realities of the marketplace are such that most employers will not offer them at all. And that is a lose/lose proposition for workers.

V. Modern Workers Desire Flexibility

One of the primary considerations that DOL should prioritize in conducting a review of its outdated regulations is the substantially increased preference of modern workers for workplace flexibility. Studies show not only that workers increasingly favor more control over their working hours and working conditions, but that they place a high value on being able to use portions of the historically standard eight-hour work day for their own purposes.¹⁴ The 2008 National Study of the Changing Workforce survey reveal that 87 percent of all wage and salaried employees would find workplace flexibility "extremely" or "very" important if they were looking for a new job.¹⁵ American workers consistently feel as if there simply is not enough time in the day to do everything that they want to do, a perception sociological researchers have dubbed a "time famine."¹⁶ Researchers note that these "feelings of time deprivation" are on the rise, even though workers' reported levels of "work-family interference and negative spillover from work to home have been essentially stable in the U.S. labor force since 2002."¹⁷ One possible explanation is that "employees' expectations for discretionary time

them. The FLSA and its interpretive regulations set the national baseline, however, and it is therefore essential that they always embody sound policy that creates the right incentives for both employees and employers.

¹⁴ KENNETH MATOS & ELLEN GALINSKY, FAMILIES & WORK INST. & SOC'Y FOR HUMAN RES. MGMT., WORKPLACE FLEXIBILITY IN THE UNITED STATES: A STATUS REPORT 17 (2011) (finding that, across industries, higher flexibility corresponds to higher job satisfaction), <http://www.familiesandwork.org/workplace-flexibility-in-the-united-states-a-status-report-2/>.

¹⁵ See CHIUNG-YA TANG & SHELLY MACDERMID WADSWORTH, FAMILIES & WORK INST., TIME AND WORKPLACE FLEXIBILITY 13 (2010), <http://www.familiesandwork.org/time-and-workplace-flexibility/>.

¹⁶ *Id.* at 4, 13.

¹⁷ *Id.* at 13.

are rising.”¹⁸ Developments in modern technology can now be combined with workplace flexibility to allow workers to accomplish both trivial and substantial tasks without sacrificing productivity, thus leading to the potential for more satisfied employees and employers.¹⁹

Just one example of the potential for synergy between modern technology and workplace flexibility can be found in the desire of many workers to be able to make time-sensitive purchases. Whether logging in to a website to buy the Christmas seasons’ hottest toy, or to land tickets to Elton John’s final tour or to see the Philadelphia Eagles win their first Super Bowl, most workers are familiar with needing to plan to be online at precisely the right time to make sure they are able to clinch some all-important purchase. Workers who have been accorded discretionary workplace flexibility by their employer (such as that enjoyed by almost all overtime-exempt employees) can stop working for five to ten minutes while they log in to make their purchase, and spend the rest of the day productively working, boosted by the satisfaction of having scored their desired new gadget or front row seats. But workers without this flexibility are doubly disappointed. Not only do they lack the flexibility to take care of a seemingly trivial but personally important task, but they also know the reason they missed out was because of their work. Where the first worker is likely to spend the rest of the day invigorated, the second worker may spend it dejected and resentful.

Why should non-exempt workers who are paid on an hourly basis be deprived of the flexibility their exempt brethren enjoy, where their working conditions are such that their employer would be willing to provide it but for the prohibitive costs imposed by DOL’s archaic interpretive rule? Decade after decade, regulations and interpretations have accumulated in the Federal Register, many of them seldom read. And there is no systematized process in place requiring a periodic review of these regulations to ensure they continue to serve the FLSA’s core purposes as working relationships and work environments continuously evolve: to regulate pay practices to protect workers “without substantially curtailing employment or earning power.”²⁰ Consequently, we are left with many rules on the books like 29 C.F.R. § 785.18, which frustrate workers’ views that increased workplace flexibility would have a positive effect on their overall well-being. Indeed, this outmoded rule may even perversely *reduce* worker earning power by incentivizing employers to mandate that employees who want to take short personal breaks instead must take *longer* breaks of at least 20 minutes so that the employer will not be required under the FLSA to compensate the employee for the personal time. Eighty years is far too long to fail to reexamine rules that are fundamentally based on presumptions about workplace operations that evolving conditions have rendered obsolete.

¹⁸ *Id.*

¹⁹ *See, e.g.,* MATOS & GALINSKY, *supra* note 7, at 8 (finding that flexibility leads to “a workforce that is more satisfied and engaged with their work, has less home interference with work, and is more likely to stay with their current employer”).

²⁰ FLSA § 2(b).

VI. Conclusion

In 1938, the Fair Labor Standards Act was hailed as one of the most important pieces of New Deal legislation. The interpretative regulations issued in the wake of this landmark piece of legislation were critical to ensuring its success. But eighty years later, DOL and the courts treat these regulations as if nothing has changed, even as technology advances at a pace that challenges the most efficient of bureaucracies.

Of course, even today, short, employer-mandated breaks—particularly in industrial settings—may often be primarily for the employer’s benefit, to keep the employees fresh. The same is true for any break that is a necessary incident of the job, such as bathroom breaks that all employees must periodically take. These are the breaks contemplated by section 785.18, and such breaks should always be compensable.

But those are not the only kind of breaks relevant to modern work environments, and DOL should rewrite its rule to acknowledge modern realities. The fast-paced world in which we live has many American workers feeling like there is not enough time in the day. Technological advances allow for the possibility that employers can adjust to the changing needs and expectations of workers by empowering them through workplace flexibility to meet both their own needs and the needs of their employer—each on their own time. But this desirable synergy cannot be realized until DOL’s interpretive regulations are revisited and retooled for the twenty-first century.