



## Can A Paid Break Become Unpaid?

By John Thompson

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Acme Corporation's longstanding policy is to give non-exempt employees two 10-minute rest breaks each workday. It treats these breaks as paid worktime. Management recently realized that, over the years, most of the employees have gradually come to be spending 15 to 20 minutes or even a little longer on each break. Acme sent out a memo reminding everyone that the breaks are limited to 10 minutes, but it had no effect. Could Acme start considering the over-10-minute extensions to be unpaid time?

The U.S. Labor Department has said that this *is* permitted under the federal Fair Labor Standards Act (FLSA), if an employer makes its intentions clear in advance.

The FLSA does not require employers to give rest breaks (which should be distinguished from lactation breaks, which *are* required). Many employers do give rest breaks, of course, and the Labor Department's position is that short periods like this (typically running from five to about 20 minutes) count as worktime for employees who are subject to the FLSA's minimum-wage or overtime requirements. In the Labor Department's view, such breaks mainly have the effect of promoting employee efficiency, so they cannot be deducted from or offset against other compensable time.

Consequently, many employers assume that, when an employee stretches a 10-minute break to 20 minutes, the FLSA does not allow the additional 10 minutes to be treated as non-compensable time. On the contrary, the Labor Department's internal enforcement manual takes the position that unauthorized break extensions need not be considered worktime, so long as the employer has expressly and unambiguously told employees that:

- authorized breaks may last only for a specific length of time;

- any extension of those breaks is against the rules; and
- any extension of those breaks will be punished.

If you are looking to rely upon this position in the future, our advice is to adopt a written break policy that includes these points and makes clear that unauthorized extensions will not be counted as worktime. And make sure you can demonstrate that employees are aware of the policy.

Remember that many states impose rest-break rules of their own. Employers must also be aware of and comply with whatever the applicable obligations are. A state need not follow FLSA interpretations with respect to breaks, including as to whether unauthorized extensions of breaks are or are not to be counted as worktime under the state's own break requirements or under its other laws relating to hours worked.

But does this mean that, if employees impermissibly extend their rest breaks, then the *whole rest break* could be treated as non-compensable time under the federal Fair Labor Standards Act? For example, if an employee stretches a 10-minute rest break to 20 minutes, then can you exclude the full 20-minute period from worktime, rather than only the additional ten minutes?

The Labor Department has said that this is not the case. In *an opinion letter on this subject*, the Acting Administrator, wrote that "[o]nly the length of the unauthorized extension of an authorized break will not be considered hours worked when the three conditions are met, not the entire break." In our illustration, then, the Labor Department would say that only the additional 10 minutes could be treated as non-compensable time.

And it's important to distinguish among different kinds of breaks. For purposes of what is and is not FLSA worktime under Labor Department interpretations, it can be useful to view scheduled breaks as falling into essentially three categories:

- bona fide meal breaks, which are typically noncompensable time
- "short" rest breaks of "about 20 minutes" or less, which the Labor Department says are typically compensable time; and
- break periods which are neither meal breaks nor "short" rest breaks, which might or might not be compensable time.

You should evaluate these categories differently in deciding whether and to what extent to treat them as being compensable hours worked under the FLSA. And, as always, be aware of and comply with whatever are the applicable break obligations of your state or local jurisdiction.

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