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Employer's Flexible Break Policy Rejected, Leading to $1.75 Million Potential Liability

In a case brought by the U.S. Department of Labor (DOL), the United States District Court for the Eastern District of Pennsylvania recently ruled against a Pennsylvania company and its owner (President and CEO) finding that the company policy requiring employees to clock in and out when taking personal breaks, including trips to the bathroom, violated the Fair Labor Standards Act, or FLSA. In addition, he ruled against the company for failing to produce complete timekeeping records.

Judge L. Felipe Restrepo ruled against a Malvern, PA-based publication company. In 2009, the company implemented a compensation policy providing, among other things that employees "may take personal breaks at anytime for any reason. Personal break time is NOT paid because it is a disadvantage to the representative to do so." The company tracked its sales representatives' time at work through a computer system. The sales representatives logged on to the company's computer and telephone systems when they arrived at work and remained logged on while completing assigned tasks, making sales calls and receiving training. When they took a break, even if it was a short break to use the restroom, they were required to log out. The representatives were paid only for the time that they were logged onto the computer system and were not paid for the break time taken.

In 2011, the DOL informed the company that not paying representatives for these periods of break time violated the Section 785.18 of the FLSA since breaks of 20 minutes or less are compensable time and must be paid under the Act. The company countered that the breaks were not compensable time under Section 785.16 because the breaks are flexible and employees are allowed to take as many breaks as they want for as long as they want. The DOL disagreed and filed suit in federal court the next year.

Judge Retrespo agreed with the DOL and applied FLSA Section 785.18, which plainly states that "Rest periods of short duration, running from five minutes to about 20 minutes . . . promote the efficiency of the employee and are customarily paid for as working time. They must be counted as hours worked . . . [and] may not be offset against other working time...." According to Judge Restrespo, section 785.18 "represents the longstanding and unchanging policy of the Wage and Hour Division [of the DOL], a policy that has been (and continues to be) consistent with other agency pronouncements about the compensability of short rest periods of 20 minutes or less." The court was unconvinced by the company's argument that since the employees could hypothetically do whatever they want during their breaks, they were, in fact, completely relieved of work-related duties and did not have to be paid pursuant to FLSA Section 785.16.

At his deposition, the company's founder claimed that the policy was meant to ensure that all sales representatives were being treated equally with respect to breaks. He also stated that he had extensively reviewed DOL and FLSA regulations, and had sought the advice of legal counsel before instituting the policy, but refused to say whether he followed the legal advice. As such, the court rejected the company's claim it had acted in good faith and ordered it to pay liquidated damages in an amount equal to the yet-to-be-determined back wage compensation.

Finally, because the company's owner, who was also the CEO and president, was the final authority for the compensation policies, he was found to be a "joint employer" under the FLSA and personally liable for the violations. Although the exact amounts of damages have not yet been determined, the Labor Department estimates them at $1.75 million in back wages and liquidated damages to more than 6,000 employees. The company has stated that it will appeal the decision.

Comment: This case demonstrates the importance of due diligence in connection with the implementation of new employee wage and compensation policies. The employer's intention was to create a more flexible break system. While the policy may have done that, it also established a system that was in violation of the FLSA. Consultation with counsel well-versed in the nuances of federal and state labor regulations, how those regulations interact and have been applied in the past is essential for a company considering implementing new policies. Companies must ensure that they are paying their employees what they are entitled to under federal and state law.