

Chapter 31

HOURS WORKED¹

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¹ This chapter supplements 29 CFR 785 and is not of itself a complete statement of the Wage and Hour Division (WHD)'s position on hours worked.

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31a PERIODS OF INACTIVITY

31a00 Employees sent home for lack of work.

If an employee is told upon reporting for work that there is no work available and is immediately sent home, he or she will not be considered to have spent any time working. If, however, the employee reports for work at the scheduled place at the prescribed time and is not immediately sent home but is suffered or permitted to wait for work after the regular shift was scheduled to begin, the time spent in waiting between the scheduled commencement of the shift and the time the employee starts work or is sent home is counted as working time. Some employment agreements provide for the payment of a minimum number of hours pay to an employee on those occasions when he or she reports for work and none is available. Pay arrangements of this kind are discussed in 29 CFR 778.220 -222. *See* FOH 32d04.

31a01 Rest periods.

- (a) 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. They must be counted as hours worked.
- (b) Where a regular rest period of known duration is longer than 20 minutes, the waiting time rules apply. In other words, if the employees are free to go where they please, and the rest period is long enough to permit the employees to use it for their own purposes, and if bona fide and not an attempt to evade or circumvent the Fair Labor Standards Act (FLSA) or Walsh-Healey Public Contracts Act (PCA), such periods are not hours worked.
- (c) Unauthorized extensions of authorized breaks are not counted as hours worked for an employee when the employer had expressly and unambiguously communicated to the employee that:

- (1) the authorized break may only last for a specific length of time;
- (2) any extension of such break is contrary to the employer's rules; and
- (3) any extension of such a break will be punished.

31a02 Homeworker's waiting time.

If the employer designates the exact time for reporting and the homeworker reports at that time and is compelled to wait, the time spent in waiting must be considered as hours worked. If the homeworker reports at a time which is not prearranged or at a time other than that specified by the employer and the employer is not prepared to accept the finished goods and charge out new material to the homeworker, the time spent in waiting will not be considered as hours worked.

31a03 Idle time during the normal workday while in travel status.

When employees are in travel status and the employer wishes to pay them for idle hours during which they normally would have worked had they been employed at their regular job and in their regular place of employment, we will respect the agreement of the parties and allow them to count the hours as hours worked. The hours must be counted as hours worked in all respects and they must be taken into consideration when computing overtime.

31b SLEEPING TIME AND CERTAIN OTHER ACTIVITIES

31b00 Less than 24 hours duty.

An employee who is required to be on duty for less than 24 hours is working even though permitted to sleep or engage in other personal activities when not busy. For example, a telephone operator who is required to be on duty for specified hours is working even though permitted to sleep when not answering calls. It makes no difference that facilities are furnished for sleeping. The employee's time is given to the employer. The employee is required to be on duty and the time is work time.

31b01 Clothes changing and washup time where collective bargaining agreement makes no mention of practice.

There are certain instances in which clothes changing and washup activities by employees on the premises of the employer are integral parts of the principal activities of the employees because the nature of the work makes the clothes changing and washing indispensable to the performance of productive work by the employees, but the collective bargaining agreement (CBA) in effect in the establishment is silent as to whether this time should be included in, or excluded from, hours worked. Where such clothes changing and washup activities are the only pre-shift and post-shift activities performed by the employees on the premises of the employer, the time spent in these activities has never been paid for or counted as hours worked by the employer, and the employees have never opposed or resisted this policy in any manner although they have apparently been fully aware of it, there is a custom or practice under the CBA to exclude this time from the measured working time, and FLSA section 3(o) applies to the time.

- (a) **Clothes changing and washup time on a formula basis**

An employer may set up a formula by which employees are allowed given amounts of time to perform clothes changing and washup activities, provided the time set is reasonable in relation to the actual time required to perform such activities. The time allowed will be considered reasonable if a majority of the employees usually perform the activities within the given time.

31b02 **Employees residing temporarily on employer’s premises.**

- (a) There are certain circumstances (usually at locations such as hard-to-reach construction jobs, isolated dredging barges and offshore drilling sites) where practical considerations make it necessary for employees to remain temporarily on the employer’s premises and to eat and sleep there during their stay. In such situations, the employees shall not be considered as on “duty of 24 hours or more” if they have a regular schedule of hours and thereafter are relieved of duties except for extra work required by the exigencies of the job. Only the actual working time need be counted as hours worked.
- (b) The rules governing “duty of 24 hours or more” (*see* 29 CFR 785.22) are applicable where, from all the conditions of employment, including the understanding of the parties, it is clear that the employee is employed to wait rather than waiting to be employed. Among the factors which would support such a conclusion are:
 - (1) the employee has no regular schedule of hours, or a schedule in name only, and is required to perform work on a helter-skelter basis at any time during the day or night; or
 - (2) the employee has a regular schedule of hours but the unscheduled periods are so cut through with frequent work calls that this time is not his or her own.
- (c) Some employers, such as offshore oil well drilling contractors, arrange transportation to remote locations in such a way that two crews having regular work schedules as in FOH 31b02(a) above, arrive at the same time. One crew will ordinarily go to work immediately and the other must wait through an entire shift (or a substantial portion thereof) before starting work. At the end of the tour of duty at the worksite, one crew, after completing its last shift, must wait through the last shift (or a substantial portion thereof) of the other crew before crews are transported back from the worksite at the same time. Such waiting time on the initial and terminal days is as much an integral part of those particular 24-hour periods as the idle periods between the regular work shifts on the other workdays. Where the employees are not on call and are completely relieved of duty, such idle time on the initial and terminal days is not considered hours worked.

31b03 **(Reserved.)**

31b04 **Radio announcers and performers.**

Time spent by performers, including radio announcers on out-of-stretch (*see* FOH 32d08(a)) radio and television programs for which talent fees (as defined in 29 CFR 550) are paid, is not counted as hours worked provided the fee is sufficient to compensate for the straight time and overtime compensation which would normally be due for such time.

31b05 **Participation in athletic contests.**

As an enforcement policy, the WHD will not consider as hours worked under the FLSA or PCA any time spent by an employee as a participant in, or as an umpire, referee, scorer, or similar official in an athletic contest sponsored by the employer, if the participation of the employee in these activities is completely voluntary and if his or her regular employment is not conditioned upon participating in these activities.

31b06 **(Reserved.)**

31b07 **Knife sharpening.**

Knife sharpening activities of knifemen are an integral part of and indispensable to the various butchering activities for which they are employed. The time so spent is compensable under the FLSA.

31b08 **Emergency government employment and disaster relief work.**

- (a) Since persons summoned or called upon by government or other public officials, pursuant to statutory authority, to engage in firefighting, national defense, civil defense, flood control, or other activities, become in legal effect employees of the state or Federal Government, the employer whose employees have been so engaged is not required to consider time spent in such activities as hours worked for the company during the workweek. Any money paid for such activities need not be included in determining the regular rate.
- (b) Similarly, where contractors are specifically requested by federal, state, or local authority under the general police powers of the government concerned to furnish employees to render disaster relief services such as rescuing injured persons, restoring municipal services, clearing streets, and controlling damage, these contractors and their employees will be considered employees of the government and the FLSA applied in the same manner as in FOH 31b08(a) above. Thus, the time spent on such work need not be counted as hours worked, and any compensation paid for such emergency work need not be included in the regular rate. Such services are normally furnished without compensation to the contractor (or at cost) and the arrangement is terminated as soon as immediate needs are met.
- (c) If a contractor contracts with a government agency for work following a disaster, to be performed as a commercial venture or as part of his or her regular business activity (as distinguished from FOH 31b08(b) above), the FLSA shall be applied in the regular manner.

31b09 **Hours worked by truck drivers, including team drivers.**

(a) **Time spent in sleeping berths in trucks**

Berths in trucks are regarded as adequate sleeping facilities for the purposes of 29 CFR 785.41 and 29 CFR 785.22. However, this rule applies to sleeping berth time of truck drivers or helpers only when they are on continuous tours of duty during trips away from home for a period of 24 hours or more. If the trip begins and ends at the home station and is performed within one working day (less than 24 hours), all time on duty on the truck is time worked (except, of course, for bona fide meal periods) even though some of that time is spent in the sleeping berth. *See* FOH 31b00.

(b) **Tours of duty of 24 hours or more but less than 48 hours**

FOH 31b12 and 29 CFR 785.22 describe excludable sleep time for hours of duty of 24 hours or more. On continuous tours of duty of more than 24 hours but less than 48 hours, 1 extra hour of sleep time in excess of the maximum 8 hours may be claimed for each hour beyond 40 that a continuous tour of duty extends, provided that the employee has actually slept such number of hours. For example, in a 42-hour continuous tour of duty, no more than 10 hours could be deducted for sleep time. Similarly, in a 45-hour continuous tour, a maximum of 13 hours could be deducted. However, in the absence of an express or implied agreement concerning the exclusion of sleep time, the time spent sleeping constitutes hours worked even though the tour of duty exceeds 24 hours. *See* FOH 31b12.

(c) Continuous tours of duty

- (1) As indicated in 29 CFR 785.12 -.16, waiting or layover time will be considered off-duty time and not part of the employee's hours of work if the employee is completely relieved of all duties and responsibilities, is permitted to leave the truck or temporary station to go anywhere, knows in advance that work will not resume until a specified time, and the period of layover is of sufficient length to be used effectively for the employee's own purposes. Thus, no standard rule of thumb, such as "2-hour layover time" or "4-hour layover time" can be used to unequivocally state that a layover period of such length has automatically broken a continuous tour of duty. Whether or not a continuous tour of duty greater than 24 hours is interrupted by a waiting or layover time is a question of fact. For example, if a truck driver stops for a layover of 2 hours, but the stopping point happens to be in a remote location which has no available facilities (*e.g.*, restaurants, etc.), the tour of duty has not been interrupted and the "off-duty" time is compensable hours worked.
- (2) With regard to team truck drivers, because of the special circumstances under which they work, we would not regard a bona fide layover period as breaking a continuous tour of duty if the employer paid wages for that period.
- (3) Time spent in non-compensable bona fide meal periods and bona fide regularly scheduled sleeping periods would not break a continuous tour of duty provided that such periods do not exceed the maximum limitations in 29 CFR 785.22 and the "40-hour rule" set forth in FOH 31b09(b) above. *See* FOH31b12.

31b10 Medical treatment during normal workday.

If an employer directs an employee, or any group of employees, to work beyond the regularly scheduled work shift, the normal workday of such employee, or group of employees, has been extended, and the same principle in 29 CFR 785.43 applies.

31b11 Book reviews by newspaper, radio, or television employees.

In some instances an employee of a newspaper, or radio or television station will read a particular book with the view to a possible book review story for use in the newspaper or on the air. This presents no problem as to hours worked where the reading is done in the course of the employee's regular duties at the establishment or elsewhere at any time at the employer's specific request. However, the reading may be done away from the employer's establishment and outside duty hours, such as at the employee's home in the evening, and on a speculative basis—that is, with the thought that a book review might be prepared. In such cases there is a substantial question as to whether the reading was done for the benefit of the

employer or for the pleasure or information of the employee. In such cases, the WHD will not assert that such reading is hours worked even though the book is subsequently reviewed in the newspaper or on the air.

31b12 Sleeping time.

(a) Background

Regulations regarding the application of hours worked principles to sleeping time appear at 29 CFR 785.20 -.23, as well as at 29 CFR 552.102, which is specific to live-in domestic service employees. Field Assistance Bulletin No. 2016-1, Exclusion of Sleep Time from Hours Worked by Domestic Service Employees, provides additional guidance regarding those regulatory provisions, much of which is broadly applicable. This chapter describes those general principles; however, because the scenarios are derived from the field assistance bulletin, they are nearly exclusively from the domestic service context.

(b) Duty of less than 24 hours

As to an employee who does not live at his or her worksite and works shifts of fewer than 24 hours, an employer may not exclude any sleep time from hours worked, even if the employee is permitted to sleep while on duty. *See* 29 CFR 785.21 and Field Assistance Bulletin No. 2016-1.

Scenario:

A home care worker provides services to a person with a disability two nights a week from 7:00 p.m. to 7:00 a.m. Even if the employee sleeps for some or most of that time, all of the time (*i.e.*, two 12-hour shifts, for a total of 24 hours each workweek) must be treated as compensable hours worked.

(c) Duty of 24 hours or more

If an employee is required to be on duty 24 hours or more, the employer may exclude a bona fide, regularly scheduled sleeping period of 8 hours or less from hours worked if certain requirements are met. These three requirements are that the employee be provided adequate sleeping facilities, the employee can usually enjoy an uninterrupted night's sleep, and the employer and employee have an expressed or implied agreement to exclude the sleep time from hours worked. *See* 29 CFR 785.22(a) and Field Assistance Bulletin No. 2016-1.

(1) *Adequate sleeping facilities are furnished by the employer*

Whether an employer has provided adequate sleeping facilities to an employee depends on the facts and circumstances of a particular arrangement. In general, an employer must ensure that the employee has access to basic sleeping amenities, such as a bed and linens, reasonable standards of comfort, and basic bathroom and kitchen facilities. The designated sleeping area and other facilities can be shared or private.

Context is important in making assessments of whether sleeping facilities are adequate. This general description applies in the domestic service context and may apply in many other contexts, but it does not foreclose the possibility that in other circumstances (*e.g.*, if an employee leads overnight camping excursions) different

types of facilities could meet this requirement. *See* 29 CFR 785.22(a) and Field Assistance Bulletin No. 2016-1.

Scenario:

A personal care attendant is assigned by a home care agency to provide home care services to a consumer in the consumer's home from 7:00 p.m. on Fridays until 9:00 p.m. on Sundays. The employee sleeps in a second bed in the consumer's bedroom, and he or she has use of the rest of the apartment, including the kitchen and bathroom. This employee has adequate sleeping facilities.

- (2) *The employee can usually enjoy an uninterrupted night's sleep (i.e., 5 consecutive hours)*

An employee can “usually enjoy an uninterrupted night's sleep” if an employer's interruptions that prevent him or her from getting 5 consecutive, uninterrupted hours of sleep occur less than half the time. Interruptions to an employee's 5 consecutive hours of sleep that occur during half or more than half of an employee's shifts are too frequent to meet this requirement. *See* 29 CFR 785.22(a) and Field Assistance Bulletin No. 2016-1.

Scenario 1:

If a home health aide is hired to work three 24-hour shifts each week for a consumer who needs regular monitoring at all times, including overnight, then it would not be appropriate for the employer to exclude any time the employee manages to sleep from his or her compensable hours worked because the employee cannot usually enjoy an uninterrupted night's sleep.

Scenario 2:

If a home health aide works three 24-hour shifts for a particular consumer each week, and on average the consumer wakes the aide for assistance during only one out of every three shifts, the requirement that the aide can usually enjoy an uninterrupted night's sleep would be met.

- (3) *There is an expressed or implied agreement to exclude sleep time*

The requirement to have an expressed or implied agreement regarding the exclusion of sleep time can be fulfilled by a written or oral agreement, or implied by the parties' conduct. No such agreement exists where an employee has objected to the exclusion of sleep time from his or her hours worked. *See* 29 CFR 785.22(a) and Field Assistance Bulletin No. 2016-1.

Scenario:

An employee has been employed for approximately 3 months and is required to work shifts of 24 hours or more. Based on the employer's usual practice, the employee is not paid for the hours between 11:00 p.m. and 6:00 a.m., which are considered sleep time, and the employee has never objected to the exclusion of sleep time. The employer and employee have an implied agreement to exclude sleep time.

(4) *Amount of sleep time that can properly be excluded*

An employer of an employee who does not reside at the worksite, works shifts of 24 hours or longer, and meets the additional requirements for the exclusion of sleep time, may exclude from the employee's hours worked no more than 8 hours of sleep time in each 24-hour period. *See* 29 CFR 785.22(a). These 8 hours need not be at night, but they must occur during a fixed window. *See* 29 CFR 785.22(a); WHD Opinion Letter FLSA (September 11, 1987); and Field Assistance Bulletin No. 2016-1.

Scenario:

If a home health aide provides home care services to a consumer in the consumer's home from 7:00 p.m. on Fridays until 9:00 p.m. on Sundays, assuming the threshold requirements for excluding sleep time are met, his or her employer *could exclude* from his or her hours worked a sleeping period, for example, from 11:00 p.m. to 5:30 a.m. (*i.e.*, for a 6.5-hour sleeping period) or from 10:00 p.m. to 6:00 a.m. (*i.e.*, for an 8-hour sleeping period), but may not exclude sleep time when he or she works from 10:00 p.m. to 7:00 a.m. (*i.e.*, for a 9-hour sleeping period) or for 8-hour periods that vary each weekend.

(d) **Live-in employees**

Certain sleep time rules apply to "live-in" employees, who are employees who reside at their worksites, including live-in domestic service employees (*i.e.*, employees who reside at the private homes in or about which they provide household services). An employee is deemed to reside at his or her worksite if he or she lives there either on a "permanent basis," meaning that he or she stays there 7 nights a week and has no other home, or stays for "extended periods of time," meaning that he or she works and sleeps there for 5 days a week (*i.e.*, 120 hours or more) or 5 consecutive days or nights, regardless of the total number of hours. *See* 78 FR 60474, FOH 25n02(a), and FOH 31b20.

Employers of live-in employees may exclude sleep time from those employees' hours worked provided the following conditions are met: the employer and employee have a reasonable agreement to exclude sleep time, and the employer provides the employee private quarters in a homelike environment. *See* 29 CFR 785.23, Wage and Hour Memorandum – 88.48 (June 30, 1988), and Field Assistance Bulletin No. 2016-1.

(1) *Reasonable agreement*

The reasonable agreement "must be an employer-employee agreement and not a unilateral decision by the employer," and it "should normally be in writing in order to preclude any possible misunderstanding of the terms and conditions of an individual's employment" (FOH 31b18(b)). Note: the WHD will accept "any reasonable agreement of the parties which takes into consideration all of the pertinent facts" (29 CFR 785.23). In other words, the reasonable agreement should reflect the realities of the particular situation. For example, sleep time may only reasonably be excluded if an employee regularly has the opportunity to sleep overnight, rather than if the employee is present to actively perform around-the-clock work. *See* Field Assistance Bulletin No. 2016-1.

(2) *Private quarters in a homelike environment*

To exclude a live-in employee's sleep time from his or her hours worked, an employer must provide private quarters in a homelike environment. *See* Field Assistance Bulletin No. 2016-1 and Wage and Hour Memorandum – 88.48 (June 30, 1988).

“Private quarters” are a living and sleeping space that is separate from the person receiving services or any other employees. Although in most cases “private quarters” will mean a separate bedroom, the sleep time requirements call for consideration of the particular circumstances of the case. For example, if a home care worker is a family or household member with whom the person receiving services already shared a residence before becoming a paid caregiver (*e.g.*, a spouse or domestic partner), the worker's existing arrangement will be considered private quarters. Or, solely in the context of a private home as opposed to at the site of a business operation, if a home care worker provides live-in services to an individual who does not have a residence with enough space to give the worker his or her own bedroom, but the home is arranged in a manner designed to give the employee as much privacy as reasonably possible, that arrangement could fulfill this requirement. *See* Wage and Hour Memorandum – 88.48 (June 30, 1988) and Field Assistance Bulletin No. 2016-1.

A “homelike environment” is a space that includes, in addition to private quarters, facilities for cooking and eating, a bathroom, and a space for recreation. These additional facilities may be shared by the provider and consumer and/or other household members. *See* Wage and Hour Memorandum – 88.48 (June 30, 1988); WHD Opinion Letter FLSA (June 25, 1990); and Field Assistance Bulletin No. 2016-1.

Scenario:

An employee, who provides home care services and has no other home, and a consumer live together in a two-bedroom apartment with a living room, kitchen with dining space, and bathroom. The consumer uses one of the bedrooms, and the provider uses the other, meaning he or she sleeps there and stores some of his or her personal possessions there. The provider's bedroom contains a bed, night table, dresser, two lamps, a desk, and a chair. Both the consumer and provider use the living room, kitchen, and bathroom. The provider, consumer, and a third party home care agency, which paired the two individuals and supervises the provider's work, all signed a written agreement that, among other things, provides that the employee's hours worked will not include the hours between 11:00 p.m. and 7:00 a.m. when he or she sleeps, except on the rare occasions the consumer needs assistance during the night. In these circumstances, because the employee has private quarters in a homelike environment and a reasonable agreement with his or her employers regarding the exclusion of sleep time, the consumer and the agency may exclude from the home care worker's hours worked the 8 hours per night between 11:00 p.m. and 7:00 a.m. spent sleeping.

(3) *Amount of sleep time that can be excluded for an employee who resides at the worksite on a permanent basis*

If a domestic service employee resides at the private home that is his or her worksite on a permanent basis (*i.e.*, has no other home), the employer and employee may agree to not count more than 8 hours per night as sleep time as long as the employee is paid for some other hours during the workweek. Although the Department of Labor (DOL) has not set a specific number of hours that must be compensated in order to permit the exclusion of the sleep time of an employee who resides on the premises permanently, the circumstances must be such that the agreement regarding work and non-work time is reasonable. A variety of agreements might meet this standard, as workers' schedules will vary based on the particular arrangement and needs of the person receiving services; there is no particular schedule necessary to make an agreement reasonable. *See* Administrator Interpretations Letter FLSA 2014-1 and Field Assistance Bulletin No. 2016-1.

Scenario 1:

If a live-in home care worker and his or her employer agree to exclude 8 hours of sleep time per night, and the employee is paid an hourly rate for services he or she performs between the hours of 8:00 p.m. and 10:00 p.m. each evening and 6:00 a.m. and 8:00 a.m. each morning, that agreement would typically be reasonable.

Scenario 2:

If a live-in home care worker's sole responsibility is to be at the residence 5 nights per week from 10:00 p.m. to 8:00 a.m., it will likely be reasonable to agree to treat 2 of those 10 hours as hours worked and exclude the remaining 8 hours as sleep time.

Scenario 3:

It will typically be reasonable to exclude sleep time during weeknights if a live-in home care worker and his or her employer agree that 4 hours per day spent in the residence on 2 weekdays and each weekend day are hours worked that must be compensated.

Scenario 4:

If a live-in home care worker's sole responsibility is to be at the residence for 8 hours each night, an agreement to exclude all time the employee is required to be on the premises will not be reasonable, nor would an agreement to consider only 1 hour per day to be hours worked.

- (4) *Amount of sleep time that can be excluded for an employee who resides at the worksite for extended periods of time*

If a domestic service or residential care employee resides at his or her worksite for an extended period of time (*i.e.*, does not live there exclusively but meets the residency requirements), the employer and employee may agree to not count more than 8 hours per night as sleep time as long as the employee is paid for at least 8 hours during the

24-hour period. *See* Field Assistance Bulletin No. 2016-1 and Administrator Interpretations Letter FLSA 2014-1.

Scenario 1:

A home care worker works and sleeps at a private home from Monday through Friday each week. Because the consumer to whom he or she provides services attends a day program, the provider is off duty between 8:30 a.m. and 3:30 p.m. He or she and the family of the consumer have a written agreement regarding this off-duty time and under which the provider's sleep time, from 10:00 p.m. to 6:00 a.m., is excluded from hours worked. His or her work time would therefore be 9 hours per day (*i.e.*, 2.5 hours from 6:00 a.m. to 8:30 a.m. and 6.5 hours from 3:30 p.m. to 10:00 p.m.). Because the provider is paid for more than 8 hours in each 24-hour period, assuming the threshold requirements for excluding sleep time are met, the family can exclude all 8 hours of the provider's sleep time (subject to the limitations described below).

Scenario 2:

The schedule of the home care worker in Scenario 1 changes such that he or she does not begin her evening shift until 5:30 p.m. and his or her sleeping period is for 7 hours, between 11:00 p.m. and 6:00 a.m. In this case, his or her work time is 8 hours per day (*i.e.*, 2.5 hours from 6:00 a.m. to 8:30 a.m. and 5.5 hours from 5:30 p.m. to 11:00 p.m.). Because the provider is paid for 8 hours in each 24-hour period, the family may exclude the 7 hours of sleep time (subject to the limitations described below).

(e) Interruptions to sleeping time

(1) *Any interruption*

As to an employee who is on duty for 24 hours or more or a live-in employee, any interruption by a call to duty of what might otherwise be properly excluded sleep time must be treated as hours worked. *See* 29 CFR 785.22(b), 29 CFR 552.102(a), and Field Assistance Bulletin No. 2016-1.

Scenario 1:

During a home care worker's sleeping period, a consumer calls out for assistance with going to the bathroom. The employee provides that assistance for 20 minutes. Those 20 minutes must be treated as paid time.

Scenario 2:

A person receiving services is sick, and the home care worker tends to him or her for 2 hours in the middle of the night. Those 2 hours are hours worked even if they are within the provider's usual sleep time.

(2) *Reasonable periods of sleep totaling 5 hours*

If an employee cannot get at least 5 hours of sleep in a sleeping period, the entire period must be counted as hours worked. These 5 hours need not be 5 continuous, uninterrupted hours of sleep, but interruptions must not be so frequent as to prevent reasonable periods of sleep that add up to at least 5 hours. If interruptions are so frequent as to prevent reasonable periods of sleep totaling at least 5 hours, the entire period must be considered hours worked. *See* 29 CFR 785.22(b); FOH 31b12(b); WHD Opinion Letter FLSA (September 11, 1987); and Field Assistance Bulletin No. 2016-1.

Scenario 1:

A live-in home care worker's regular sleep time is from 11:00 p.m. to 7:00 a.m. If the person for whom he or she works wakes his or her up once at 4:30 a.m. for assistance taking medication, an interruption that lasts half an hour, those 30 minutes must be paid; however, the remainder of the time (*i.e.*, the 5.5 hours from 11:00 p.m. to 4:30 a.m. and the 2 hours from 5:00 a.m. to 7:00 a.m.) may be excluded as usual because the employee got reasonable periods of sleep totaling more than 5 hours.

Scenario 2:

A live-in home care worker's regular sleep time is from 11:00 p.m. to 7:00 a.m. If the person receiving services wakes the home care worker up at 2:00 a.m. for assistance going to the bathroom, an interruption that lasts 15 minutes, those 15 minutes must be paid; however, the remainder of the time (*i.e.*, the 3 hours between 11:00 p.m. and 2:00 a.m. and the 4 hours, 45 minutes between 2:15 a.m. and 7:00 a.m.) may be excluded from hours worked as usual because the employee got reasonable periods of sleep totaling more than 5 hours, even though no single period of 5 hours or more was uninterrupted.

Scenario 3:

If the person receiving services needs the employee's assistance at 12:30 a.m., 2:00 a.m., 4:00 a.m., 5:00 a.m., and 6:00 a.m. for 20 minutes each time, the periods between interruptions are not reasonable periods of sleep, and therefore the 5-hour threshold will not have been met.

[01/13/2017]

31b13 **Changing clothes at home.**

Employees who dress to go to work in the morning are not working while dressing even though the uniforms they put on at home are required to be used in the plant during working hours. Similarly, any changing which takes place at home at the end of the day would not be an integral part of the employees' employment and is not working time.

31b14 **On-call employees required to remain at home.**

Where an on-call employee performs services for his employer at home and yet has long periods of uninterrupted leisure during which he or she can engage in the normal activities of living, the WHD will accept any reasonable agreement of the parties for determining the number of hours worked. As an example, this policy will apply to an on-call employee who

is required by the employer to remain at home to receive telephone calls from customers when the company office is closed. The agreement should take into account not only the actual time spent in answering the calls but also some allowance for the restriction on the employee's freedom to engage in personal activities resulting from the duty of answering the telephone.

31b15 Fire and disaster drills.

Time spent by employees in participating in fire or other disaster drills, whether voluntary or involuntary or during or after regular working hours, is considered substantially to the benefit of the employer and therefore is compensable hours of work. Of course, such time may be compensated at the applicable statutory minimum wage rather than the employees' regular rates.

31b16 Inspections under the Occupational Safety and Health Act of 1970.

(a) Section 8(e) of the Occupational Safety and Health Act of 1970 (OSH Act) provides that:

(1) during an inspection under that act an authorized representative of the employees shall be given an opportunity to accompany the Occupational Safety and Health Administration (OSHA) investigator; *or*

(2) where there is no authorized employee representative, the OSHA investigator shall consult with a reasonable number of employees concerning health and safety at their workplace.

(b) Time spent by an employee accompanying the OSHA investigator as in FOH 31b16(a)(1) above is not considered hours worked. Section 8(e) of the OSH Act does not require that an employee representative accompany the investigator, nor does it impose a duty on the employer to require an employee to accompany the investigator. Such time spent by an employee is considered voluntary and primarily (although not wholly) for the benefit of the employees.

(c) Time spent by employees consulting with the OSHA investigator as in FOH 31b16(a)(2) above during their normal workday when required to be on the employer's premises is hours worked.

31b17 Training courses and programs.

29 CFR 785.27 -.31 contains guidelines for determining whether attendance or participation by employees in training courses and programs constitute hours worked (*see* FOH 10b11). Certain training plans may require as a condition of promotion within an occupational classification or to a higher classification, the satisfactory completion of a prescribed course of study. Attendance at or participation in such courses will be considered voluntary where the existing classification level or working conditions are not adversely affected by an employee's decision not to participate.

31b18 Employees residing on employers' premises: recording working time.

(a) Where there is a "reasonable agreement" between employer and employee pursuant to 29 CFR 785.23, such an agreement establishes the hours the employee is considered to work, but

precise recordkeeping regarding hours worked is not required. The employer may keep a time record showing the schedule adopted in the agreement and indicate that the employee's work time generally coincided with the agreement or schedule. If it is found by the parties that there is significant deviation from the initial agreement, a new agreement should be reached reflecting the actual facts.

- (b) The "reasonable agreement" must be an employer-employee agreement and not a unilateral decision by the employer. Such an agreement should normally be in writing in order to preclude any possible misunderstanding of the terms and conditions of an individual's employment. It must take into account not only the time spent working but also the time when the employee may engage in normal private pursuits, with sufficient time for eating, sleeping, entertaining, and other periods of complete freedom from all duties when he or she may leave the premises for personal reasons. The agreement must also consider such relevant factors as the degree to which the use of the employee's personal time is limited or restricted by the conditions of employment and the extent of interruption to eating and sleeping periods. However, whether an employee is free to use time for personal pursuits will depend on the facts in each case, notwithstanding the provisions of any written agreement.

31b19 Hours of work for firemen and policemen.

The rules on hours of work for firemen and policemen are covered in 29 CFR 553, subpart C, "Fire Protection and Law Enforcement Employees of Public Agencies." *See* FOH 31b21 -22.

31b20 Employees residing on the employer's premises for 5 days a week.

- (a) The "reasonable agreement" referred to in 29 CFR 785.23 may apply to an employee who resides on the employer's premises 5 days a week, since such employee may be considered as residing on the employer's premises "for extended periods of time." *See* 29 CFR 552.102.
- (b) Ordinarily, an employee residing on the employer's premises for 120 hours or more in a week would meet the requirements of FOH 31b20(a) above. Where less than 120 hours in a week are spent residing on the employer's premises, 5 consecutive days or nights would also qualify as residing on the premises "for extended periods of time." For example, employees who are on duty from 9 a.m. Monday until 5 p.m. Friday would also be considered to reside on the employer's premises. Even though on duty for less than 120 hours, they are on duty for 5 consecutive days (Monday through Friday). The fact that they sleep over only 4 nights does not alter this conclusion. Similarly, employees who are on duty from 9 p.m. Monday until 9 a.m. Saturday would also be considered to reside on their employer's premises since they are on duty for 5 consecutive nights (Monday night through Friday night).

31b21 Meal periods for employees under section 7(k).

Pursuant to 29 CFR 553.15(a), where an employee employed under section 7(k) is on duty 24 hours or less, a meal time may not be excluded from hours worked in the usual circumstance. However, where such an employee is completely relieved from duty during the meal period, and is *not* required, for example, to remain in radio contact, such an employee would be *off duty* during this period and such time would not be included in hours worked for purposes of section 7(k).

31b22 Fire fighters: time spent sleeping.

Under 29 CFR 553.222(c), where an employer and employee had agreed that time spent sleeping be compensable, the employer cannot make unilateral changes in the agreement in order to exclude sleep time from compensable hours of work and then consider the employee's continued employment to be acceptance of such change. Some form of uncoerced mutual assent is necessary to consider the parties' agreement validly changed.

29 CFR 553.222(c) does not address the converse (*i.e.*, the procedure for making sleep time compensable where there was previously an expressed or implied agreement to exclude such time from compensable hours of work). Consequently, an employee could unilaterally withdraw his or her consent and the employer would then be required to compensate the employee for any future sleep time that may occur. However, the employer would not be *required* to agree to a continuation of the same terms and conditions of employment. The employer and employee would be free to establish new conditions of employment, such as rate of pay, hours of work, or reassignment. Where employees are represented for collective bargaining purposes, such changes in the terms or conditions of employment could be addressed within the collective bargaining process. Non-represented employees would be left to private agreement between the employer and themselves.

31b23 Meal periods of less than 30 minutes.

Bona fide meal periods are not worktime. Bona fide meal periods do not include coffee breaks or time for snacks. Ordinarily 30 minutes or more is long enough for a bona fide meal period.

Meal periods of less than 30 minutes during which the employee is completely relieved for purposes of eating a meal may be bona fide— and thus not hours worked— when certain special conditions are present (*see* 29 CFR 785.19). The conditions reviewed to make this determination, which should be considered in context on a case-by-case basis, include:

- (a) Work-related interruptions to the meal period are sporadic and minimal.
- (b) Employees have sufficient time to eat a regular meal. Periods less than 20 minutes should be given special scrutiny to ensure that the time is sufficient to eat a regular meal under the circumstances presented. The period involved is not just a short break for snacks and/or coffee but rather is a break to eat a full meal, comes at a time of the day or shift that meals are normally consumed, and occurs with no more frequency than is customary.
- (c) There is an agreement (*e.g.*, a CBA) between the employees and employer that the period of less than 30 minutes is sufficient to eat a regular meal.
- (d) Applicable state or local laws do not require lunch periods in excess of the period indicated.

31c TRAVEL TIME

31c00 Employees required to perform duties while traveling.

In the case of employees required to travel several days and to perform active duty while traveling, such as feeding or watering cattle sent to market by rail or the like, it is difficult to determine the exact hours worked. Under these circumstances, any reasonable agreement entered into between the employer and the employee, or established by custom or practice,

which takes into account the amount of time required for active labor by the employee and the fact that the employee is subject to call 24 hours a day, will be acceptable.

31c01 Operating employer's vehicle for employee's convenience.

- (a) In certain situations, an employee is responsible for a vehicle and its equipment and for having it at the worksite at the proper time. The employer may permit the employee to drive the vehicle to and from home. In situations of this type where the permission is granted for the employee's own convenience and the travel is within the normal commuting distance of employees in the area, time spent in driving is not hours worked.
- (b) Where the vehicle is also used in connection with emergency calls outside of normal working hours, a determination must be made as to whether the use of the vehicle is in fact for the convenience of the employee or primarily for the benefit of the employer. The frequency of emergency calls may indicate for whose convenience or benefit the vehicle is being used.

31c02 Driving employer's vehicle transporting other employees.

- (a) Driving time is not considered hours worked in instances where an employee elects to transport other employees to and from work and such employee is driving the employer's vehicle for his or her own convenience.
- (b) On the other hand, where the driver is directed by the employer to report to the company warehouse, garage, or yard as a pickup point, then time spent driving the employees from such point to the workplace is hours worked.
- (c) Drivers of vanpools need not be paid for time spent transporting other employees to and from work under the following conditions:
 - (1) The transportation provided must be primarily for the benefit of participating employees.
 - (2) Participation in the program is entirely voluntary and employees are free to accept or reject the arrangement at any time.
 - (3) The employee-driver is chosen by the participating employees.
 - (4) The pickup times and route are established by the participating employees.
 - (5) The employer has virtually no control over the arrangement.

31c03 Owner-drivers.

- (a) Whether the time spent in caring for a team of horses, or for a truck, and driving to and from the job site outside the employee's workday is hours worked, depends on the nature of the hiring agreement.
- (b) If under the agreement the employer has no right to possession of the team or truck away from the job site but has merely hired the use of the team or truck for the daily working period at the job site, beginning after the delivery there of the harnessed team or the truck by the owner and ending when the owner leaves with his team or truck, the employer obviously

has no responsibility for the team or truck outside this period, and cannot direct what is to be done in the way of caring for it, or how, where, or by whom it shall be readied for work. In such an event, the care and transportation of the team or truck would be engaged in by the owner and not as an employee of the employer. Under these circumstances, time spent in those activities outside the employee's workday at the job site would not be hours worked.

- (c) On the other hand, if the agreement between the employer and the employee contemplates outright hire of the team or truck for a period of time so that the owner employee is caring for the team or truck and transporting it as a mere custodian for the employer to whom it is rented, the time so spent by the employee is hours worked.
- (d) In these situations, a determination of hours worked cannot be made unless the Wage and Hour Investigator (WHI) ascertains exactly the terms of the agreement between the employer and the employee.

31c04 Travel where heavy, burdensome equipment is carried.

- (a) Travel time spent in carrying heavy burdensome equipment, as contrasted with light hand tools, is hours worked. On the other hand, carrying light hand tools between an employee's home and his work site, involving no appreciable burden or inconvenience, is not hours worked. In determinations of this kind, some consideration must be given to the custom in the industry. For example, it is not a part of a carpenter's principal activities for him to carry his usual tool box, containing hammer, saw, et cetera, from his home to his work site.
- (b) An employee who is required regularly to carry heavy mail or bulky packages to the post office en route from the factory to his or her home, is working. A different situation exists if an employee carries only light mail to and from the post office on the way to or from work, and generally the time so spent is not hours worked.

31c05 Homeworker's travel.

The time spent by homeworkers in traveling to and from the employer's premises (or other pickup/dropoff point) to obtain work-related materials or equipment and/or to deliver finished products, is primarily for the employer's benefit and must be included in the total hours worked by homeworkers. Where such trips are combined with personal errands (*e.g.*, grocery shopping or visits with friends), the time spent in such personal pursuits is excluded from the total travel time for the trip in calculating hours worked.

Note: the back wage recovery period, as a result of non-compliance with this position, shall not extend back beyond the date of this insert (08/08/1988).

31c06 Emergency calls.

- (a) Normal travel from home to work is not worktime. However, there may be instances when travel from home to work is worktime. For example, if an employee who has gone home after completing his or her day's work is subsequently called out at night to travel a substantial distance to perform an emergency job for one of his or her employer's customers, all time spent on such travel is working time. However, where an employee is given prior notice, as for example, he or she is told on Friday that he or she will be required to work at a customer's place of business on Saturday, it will not be considered as an emergency call outside his or her regular working hours.

- (b) The WHD is taking no position on whether travel to the job and back home by an employee who receives an emergency call outside of his regular hours to report back to his regular place or places of work to do a job is working time. Therefore, such time will no longer be counted as hours worked. In the event that a position on this type of travel is again adopted the provisions of FOH 52f07(a)(1) will apply to past violations on any such positions.

31c07 Travel by boat or helicopter.

Time spent in travel by boat or helicopter from a dock or heliport to an offshore drilling rig and return by employees engaged in offshore drilling for oil is a preliminary and postliminary activity. As such, it must be counted as hours worked under section 4(b) of the Portal-to-Portal Act to the extent that it is compensable by contract, custom or practice. Thus, if all of the time spent in such travel is paid for, all of it must be counted as hours worked. On the other hand, where payment is made for a portion of the time spent in such travel, only that portion of the travel time which has been made compensable must be counted as hours worked. In this respect, where a partial payment is made and the employer's records do not indicate the portion of the travel time that is to be compensated the intent of the parties and all the facts and circumstances surrounding the agreement or understanding will determine what portion of the travel time has been made compensable.

31c08 Layover or on-call time of drivers and helpers.

- (a) 29 CFR 785.15 -.17 are applicable to layover or on-call time of truck drivers and helpers. It makes no difference whether such employees are at home or at some other location.
- (b) On the other hand, the travel time rule stated in 29 CFR 785.39 does not apply to such employees even if they are away from home overnight but applies only to employees who, as passengers on an airplane, train, boat, bus, or automobile engage in travel which keeps them away from home overnight. However, *see* FOH 31b09.

31c09 Temporary help firms.

The typical temporary help firm (such as Peakload, Inc. and Manpower, Inc.) is engaged in supplying workers employed by the firm on an as needed basis to various establishments. A person who desires employment usually registers with the temporary help firm. For certain types of jobs the registrant usually voluntarily shows up at some central location where he or she awaits employment opportunity. If work is available or becomes available, he or she is sent or taken to the customer's establishment. If accepted by the customer, he or she remains and performs the work of that employer. At the end of the day, the worker is free to go home and collect his or her pay later or to return to the central location to be paid for his or her work. The circumstances vary. If the employment understanding clearly is that the pay or the time of the employee begins and ends at the customer's establishment, waiting for assignments at the central location or in travel from there to the customer's establishment and return would not be compensable worktime. In other words, his or her working time is computed in the same manner as if he or she had gone directly from his or her home to the customer's establishment and returned home from there at the end of the day. This would be true even though he or she may be assigned to work at the same customer's establishment for more than one day.

31c10 Compensability of travel time of employees who voluntarily drive company vehicles between home and work sites.

(a) Background

- (1) In some industries employers utilize somewhat modified vans or trucks for use by employees who perform service work at a customer's home or business establishment. The vehicle provides a necessary means for the employee to transport needed parts, tools, equipment, etc., to various work sites during the day. The employer may give employees the opportunity to drive the vehicle between home and work on a voluntary basis.
- (2) In some instances, the employee starts the work day by calling the employer's dispatcher from home, receiving one or more work assignments to begin the work day, and traveling directly from home to the first work site rather than traveling first to the employer's establishment and then to the work site. At the end of the day the employee may be required to call the employer's dispatcher to advise that the last service call for the day has been completed and that the employee is leaving the last work site for home, where the employee parks and locks the vehicle. During this call to the dispatcher, the employee may or may not receive assignments for the next day.
- (3) The WHD policy on the compensability of travel time in such situations was set forth in WHD Opinion Letter FLSA (August 5, 1994). In light of the concerns expressed by both employers and employees, and the possible effects of applying this interpretation in a wide variety of industries, the Secretary of Labor, on October 19, 1994, deferred any WHD efforts to enforce the policy in that opinion letter while a review was undertaken.

(b) Policy

WHD Opinion Letter FLSA-1302 (April 3, 1995) withdrew WHD Opinion Letter FLSA (August 5, 1994), and set forth the WHD's position in this matter. Accordingly, where the following circumstances exist, time spent traveling between the employee's home and the first work site of the day and between the last work site of the day and the employee's home need *not* be compensated:

- (1) Driving the employer's vehicle between the employee's home and customers' work sites at the beginning and end of the workday is *strictly voluntary* and not a condition of employment
- (2) The vehicle involved is the type of vehicle that would normally be used for commuting
- (3) The employee incurs no costs for driving the employer's vehicle or parking it at the employee's home or elsewhere
- (4) The work sites are within the normal commuting area of the employer's establishment

31d SPECIAL PROBLEMS

31d00 Ambulance services.

(a) Numerous hours worked questions may arise with respect to employees engaged in ambulance services. The most common are as follows:

(1) *Less than 24 hours duty*

Ambulance employees who are required to be on duty at their employer's place of business for periods of less than 24 hours are working even though they are permitted to sleep or engage in other personal activities when not busy. *See* 29 CFR 785.21. However, the usual rules with respect to meal periods would apply when they are relieved of all duties for the purpose of eating meals.

(2) *Duty of 24 hours or more*

See 29 CFR 785.22. Some ambulance employees may be required by the employer to be on duty on his premises for 24 hours or more. The parties may agree to exclude bona fide meal periods and a regularly scheduled sleeping period of not more than 8 hours, provided the employer furnishes adequate sleeping facilities and the employee can *usually* enjoy uninterrupted sleep during the period. If the sleeping period is *more* than 8 hours, *only* 8 hours may be excluded from hours worked. Any interruption of the sleeping period to respond to calls must be counted as hours worked. If the period is interrupted to such an extent that the employee cannot get a *reasonable* "night's sleep," the entire sleeping period must be counted as hours worked. For enforcement purposes, the night's sleep will be considered *reasonable* if the employee can get *at least* 5 hours sleep during the period. Thus, where these tests are met, the *actual* sleeping time (*i.e.*, not less than 5 hours and not more than 8 hours) may be excluded from hours worked. Off-duty periods during which the employee has complete freedom from duties and may leave the premises for his or her own purposes may also be excluded.

(3) *Employees who reside on the employer's premises permanently or for extended periods of time*

Some ambulance service employees reside on their employer's premises. In such cases, the employee is not working all the time he is on the premises. In determining hours worked, bona fide off-duty time need not be counted and any reasonable agreement of the parties which takes into consideration all the pertinent facts will be accepted. *See* 29 CFR 785.23. In the absence of an agreement, the WHI should make a reasonable determination giving recognition to the facts in the particular case which indicate the amount of time that the employee does have to eat, sleep, and devote to his own pursuits.

(4) *On-call time*

Except where the employee is on duty 24 hours or more or resides on the premises, time spent by an employee in an on-call status at his or her employer's establishment is hours worked. On the other hand, where an employee is not required to remain on his or her employer's premises but is free to engage in his or her own pursuits and merely required to leave word where he or she may be reached, the time so spent is not considered to be hours worked. *See* 29 CFR 785.17. If the employee does in fact go out on a call, the time actually spent in making the call including travel time is hours worked. Also, there may be situations when calls are so frequent or the on-call

conditions so restrictive that the employee is not really free to use the intervening periods for his or her own benefit. In such cases he or she may be considered as engaged to wait rather than waiting to be engaged and the waiting time would also be counted as hours worked.

(5) *Employee who takes ambulance to his home*

In the ordinary case where an employer permits an employee to drive an ambulance to and from his home for the employee's own convenience, the time so spent in driving is not hours worked (*see* FOH 31c01). If the employee is required to take the ambulance home in order to be able to respond to calls immediately, all the time spent in driving would be hours worked. The time the ambulance remains parked idly outside the employee's residence, and the employee is free to engage in his own pursuits subject only to the understanding that he or she leave word at his or her home or with company officials where he or she may be reached, would not be regarded as hours worked under the FLSA. The waiting time would be counted as hours worked only in situations of the type referred to in the last two sentences of paragraph FOH 31d00(a)(4). If the ambulance is parked at the employee's home, the employee would be considered working from the time he or she sets out on a call until the time he or she returns to his or her home.

31d01 Community residences for individuals with intellectual or developmental disabilities and others in need of custodial care.

(a) Employees of these group homes may have regularly scheduled off-duty periods during the day (for which they are not paid) which might ordinarily break a continuous tour of duty of 24 hours or more. Therefore, a question arises as to whether their sleep time can be deducted from working time.

(b) **Full-time houseparents**

The facilities in question employ houseparents, as well as relief staff in many cases, to provide custodial care for individuals who reside at the facilities. The houseparents sleep overnight, sometimes as many as 5 or 6 days in a row, after which they get a day or 2 off. In addition, the houseparents may also have several hours off each afternoon, when they are free to do whatever they choose, including leaving the premises. They sleep in private quarters separate from the residents of the group home. Many of these houseparents maintain permanent residences elsewhere in the community, but others have as their only residence the facility for individuals with intellectual or developmental disabilities. Where such full-time house parents meet the standards set forth in FOH 31b20, they are considered to be residing on the premises in accordance with 29 CFR 785.23. Therefore, the sleeptime rules in 29 CFR 785.22 -.23 will be applied.

(c) **Relief employees**

(1) The relief staff may stay overnight at a facility for one or more nights a week. During a 24-hour period, these employees may also have regularly scheduled off-duty time during the day with complete freedom from all responsibilities. They, too, sleep in private quarters separate from the residents of the group home.

- (2) In situations where a community residence employs at least one employee who resides on the employer's premises "for extended periods of time" (*see* FOH 31b20 and 29 CFR 785.23), the employer and a relief employee who performs essentially the same duties as such full-time employee may enter into a reasonable agreement (*see* FOH 31b18(b)) to hours worked. Such an agreement, entered into in advance of the performance of any work, may provide that sleeping time of up to 8 hours can be excluded from compensable hours of work, regardless of the length of the tour of duty involved. Also, a mutually agreed-upon amount of off-duty time, during which the employee is completely free from all responsibilities, can be excluded from compensable hours of work. Since the residents of such facilities are usually on the premises all day on weekends, the hours worked by weekend relief employees may be significantly longer than the hours worked by the employees who work weekdays. Agreements with weekend employees must reflect such differences.