FOCUS: LABOR AND EMPLOYMENT LAW



Shifting Gears or Cruise Control? DOL's New Opinions on Commuting

Marc N. Aspis

Have you ever been in standstill traffic on the (euphemistically named) Long Island Expressway (or any other clogged parkway for that matter)? Have you ever inexplicably missed a connection at Jamaica Station? You may have thought to yourself, "commuting in and around Long Island is time-consuming and stress-inducing—I should get paid for this." Spoiler alert: ordinary commuting time is generally not considered "work" and thus not compensable. In late July, the U.S. Department of Labor's ("DOL") Wage and Hour Division ("WHD") released two opinion letters ("Letter 9" and "Letter 10")[1] further defining the contours of when—if at all—commuting time can be considered work and compensable, providing important considerations for both employees and employers.

Before diving into the various rules regarding commuting, it is important to note the role that WHD opinion letters play. WHD opinion letters do not have the force of law.[2] The DOL explains that opinion letters "serve as a means by which the public can develop a clearer understanding of what the Fair Labor Standards Act ("FLSA") and Family Medical Leave Act ("FMLA") compliance entails[,]"[3] and may be relied upon as a "good faith defense to wage claims arising under the FLSA."[4] DOL opinion letters often (if not always) deal with highly specific fact patterns, and opinion letters will contain a caveat that other facts or history may compel a different result. It is also worth noting that courts are no longer required to per se follow agency interpretations, but can make independent determinations of statutory meaning.[5]

There are several important concepts that underpin the DOL's analysis in Letter 9 and Letter 10.

Work

Broadly speaking, the FLSA requires most employers to pay employees at least the federal minimum wage for hours worked (and at least time and a half for overtime). Letters 9 and 10 point out that the FLSA does not define "work." Citing U.S. Supreme Court precedent dating back to the 1940s, as well as more recent federal court decisions and other WHD opinion letters, the common theme is that compensable work is time that employees spend performing duties primarily for the benefit of the employer. While seemingly common-sense and simple, this description of work has given rise to much litigation, in addition to formal and informal guidance.

Portal Act

Fearing that the open-ended definition of work might lead to unintended consequences, Congress enacted the Portal-to-Portal Act (the "Portal Act") in 1947.[6] As summarized by Letters 9 and 10, the Portal Act clarified that employers do not need to compensate employees for time spent "(1) walking, riding or traveling to and from the actual place of performance of the principal activity or activities which [an] employee is employed to perform, and (2) activities which are preliminary to or postliminary to said principal activity or activities[.]" In other words, getting to or from a workstation and actions performed before or after work are generally not considered work and thus not compensable. It is important to note that the Portal Act only applies to activities before or after the defined workday—it has no bearing whatsoever on activities during the workday.

Commuting Versus Travel

Under the Portal Act, getting to or from the job ("ordinary commuting time") is generally not compensable work.[7] Many folks, and especially people living in metro New York, wish that commuting would be compensable, but at this point it is still just a wish and not likely to change any time soon.

By contrast, travel, when part of the principal activity of the work, is generally compensable. Letters 9 and 10 give examples such as going from worksite to worksite during the workday (*e.g.*, a repairman) or traveling somewhere other than a regular workspace for a special assignment (*e.g.*, a lawyer who practices on Long Island but is required to go to Albany for a trial). Indeed, even regular commuting can be considered compensable work if the employee

Reprinted with permission by the Nassau County Bar Association.

is actually performing work during the commute, such as taking calls or crunching numbers on the train.

Continuous Workday

Courts and the DOL have long recognized the "continuous workday rule," namely that "compensable time comprises 'the period between the commencement and completion on the same workday of an employee's principal activity or activities...[,] whether or not the employee engages in work throughout all of that period.'"[8] The DOL codifies in the federal regulations that the scenarios contained in the following non-exhaustive list constitute work: "[a] stenographer who reads a book while waiting for dictation, a messenger who works a crossword puzzle while awaiting assignments, fireman who plays checkers while waiting for alarms and a factory worker who talks to his fellow employees while waiting for machinery to be repaired[.]"[9] Letter 9 notes that bathroom breaks and short rest periods also count as working time. The continuous workday doctrine has recognized the following exceptions: off-duty time[10] and bona fide meal periods (subject to certain requirements).[11]

These core principles are sometimes conflicting and sometimes complementary, requiring courts and the DOL to apply them based on specific fact patterns. This can be seen below with respect to Letters 9 and 10.

Letter 9

Letter 9 describes three scenarios in which non-exempt employees can shift or possibly shift their commute time. As a general matter, "non-exempt" employees are hourly employees and "exempt" employees are salaried.[12] Scenario 1 involves an employee who requests to commute mid-day (as opposed to during rush hour); Scenario 2 involves an employee who volunteers to do extra work early in the morning (so as to avoid arriving early or leaving late); and Scenario 3 involves an employee who requests to leave early to catch the last bus home (and then continue the work at home). The DOL ruled that the commuting time in these scenarios was not "work," specifically concluding that "the home-to-work (or work-to-home) travel in all three of the scenarios you described would not qualify as FLSA-covered 'work,' as the facts provided indicate that such travel time would be an 'ordinary' commute that is a normal incident of employment and thus primarily benefits the employee."[13] In other words, the DOL's view is that ordinary commuting is ordinary commuting, regardless of when it actually takes place and regardless of any unique personal circumstances. The DOL also noted that:

- The mid-day commute is a third exception to the continuous workday doctrine.
- Mid-day travel that is not "ordinary" and primarily benefits the employer would still be considered "work."

Letter 10

This letter deals with a question from an employee. The employee is a field service engineer and performs services at clients' locations. The employee's regular paid shift is from 8:00 a.m. to 5:00 p.m., but the first appointment can be as early as 8:00 a.m. The employer sends service requests between 7:00 a.m. and 8:00 a.m., and the employee then needs to make calls to schedule appointments and/or line up other field service engineers.

Based on the above background facts, the employee posed two scenarios. Scenario 1: The employee receives all the service requests and makes all the calls before the employee leaves at 8:00 a.m. to go to the first service call. Between 7:00 a.m. and 8:00 a.m., in addition to receiving service requests and scheduling appointments, the employee does some personal or preliminary things (including drinking coffee). Scenario 2: Similar to Scenario 1, but the employee must leave the house at 6:00 a.m. to make an 8:30 a.m. appointment. The employee receives the service requests and makes calls between 7:00 a.m. and 8:00 a.m., mostly from the car. In Scenario 2, the employer does not pay for the 6:00 to 7:00 a.m. hour but does pay from 7:00 a.m. onward.

With respect to Scenario 1, the DOL found that receiving service requests "is likely not compensable worktime" because it is not integral to the employee's primary responsibilities. However, the time spent scheduling appointments and/or calling other engineers is compensable worktime because "[t]hese activities are required by, and primarily benefit, your employer[.]"[14] Interestingly, the DOL further found that the commute from the employee's home to the first appointment was compensable because it occurs after the employee has performed significant services (*i.e.*, the calls, indicating that the workday has begun) and this commute "bears few, if any, of the hallmarks of an ordinary commute between an employee's home and worksite."[15]

With respect to Scenario 2, the DOL found that the first hour of travel (6:00 a.m. to 7:00 a.m.) is ordinary commuting (and not compensable), but the remainder of the trip is compensable because the workday starts when the employee starts making calls, and the employee devotes the time between 7:00 a.m. and 8:00 a.m. to making calls.

Moving Forward

In these companion opinions, the DOL reached seemingly opposite conclusions—commuting was not compensable for some employees but compensable for others. To add to the confusion, DOL opinions are extremely fact-specific, where even slight shifts can move the needle, and may not hold up in court. Moving forward, employers and employees need to carefully analyze the categories of workers involved, which tasks are primary and which are incidental, the timing of certain activities, and the specific contours of the business. Employers and employees should review DOL opinion letters for guidance on whether pay practices are appropriate. Formally requesting guidance from the DOL is not the worst idea for employers, because the legal fees incurred in preparing a request for an opinion letter are far less than the legal fees for defending a class action; for employees, it is important to understand if they are being properly paid by their employers.

1. U.S. Dep't of Lab., Wage & Hour Div., Opinion Letters FLSA 2026-9 & FLSA 2026-10 (Jul. 22, 2026).
2. U.S. Dep't of Lab., Wage & Hour Div., Final Rulings and Opinion Letters, www.dol.gov (last visited Aug. 17, 2026) (noting that the "The requirements of the Fair Labor Standards Act (FLSA) and Family Medical Leave Act (FMLA) are set by statutes and regulations.").
3. *Id.*
4. *Id.*
5. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024).
6. Pub. L. No. 80-49 § 4(a)(1)-(2), 61 Stat. 84, 87 (1947) (codified as amended at 29 U.S.C. § 254(a)(1)-(2)).
7. Letter 9 notes that "both before and after the Portal Act, WHD and courts have long confirmed that '[n]ormal travel from home to work is not worktime.'" Opinion Letter FLSA 2026-9, *supra* note 1 at 9 (quoting 29 C.F.R. § 785.35).
8. *Sandifer v. U.S. Steel Corp.*, 571 U.S. 220, 226 (2014) (quoting 76 Fed. Reg. 7655, 7658 (Nov. 18, 1947) & 29 C.F.R. § 790.6(b)).
9. 29 C.F.R. § 785.15.
10. 29 C.F.R. § 785.16(a) ("Periods 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.").
11. 29 C.F.R. § 785.19(a) ("Bona fide meal periods are not worktime.").
12. Exempt or non-exempt in this context refers to whether an employee is subject to the minimum wage/overtime rules of the FLSA. The standard for determining whether an employee is exempt or non-exempt can be very detailed and is outside the scope of this article.
13. Opinion Letter FLSA 2026-9, *supra* note 1 at 12.
14. Opinion Letter FLSA 2026-10, *supra* note 1 at 6, 7.
15. Id. at 8.



Marc N. Aspis, Special Counsel at Phillips Lytle LLP, is a member of the firm's Corporate and Business Law Practice, with extensive experience in employee benefits and executive compensation. He can be reached at maspis@phillipslytle.com.

Reprinted with permission by the Nassau County Bar Association.