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**WHEN IT COMES TO THE FLSA, ASK PERMISSION, NOT FORGIVENESS:
The Third Circuit Rules Against Using Paid Non-Work Time to Offset Required Overtime Payments**

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For a number of years, the amount of “wage-and-hour” lawsuits filed annually in courts across the country under the Fair Labor Standards Act (“FLSA”) has been on the rise. These lawsuits principally allege that employees who are paid hourly do not receive compensation for a portion of the time that they are working. Frequently, plaintiffs in these lawsuits seek overtime compensation, defined as pay of at least one and one-half times the employee’s regular rate, because they allege that they worked more than a forty-hour workweek. While some observers continue to prognosticate a reversal of the FLSA lawsuit trend, the United States Court of Appeals for the Third Circuit recently reminded businesses of exactly why wage-and-hour lawsuit filings have not slowed.

In its recent decision, Smiley v. E.I. DuPont De Nemours & Co., No. 14-4583

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(3d Cir. October 7, 2016), the Court made clear that employers must compensate non-exempt employees for all hours worked, even when they compensate employees for time that they could treat as non-compensable under the FLSA.

In Smiley, the plaintiffs were non-union, hourly workers at DuPont’s manufacturing plant in Towanda, Pennsylvania. They were scheduled for 12-hour work shifts. During each shift, the employees received three 30-minute breaks.

The plaintiffs alleged that, prior to and following each shift, they spent time putting on or taking off their uniforms and protective gear (“donning and doffing”), and performing “shift relief,” where outgoing shift employees would share information with incoming shift employees. The employees were not “on the clock” during these activities – which could take between 30 and 60 minutes. The plaintiffs filed claims under the FLSA and Pennsylvania’s Wage Payment and Collection Law seeking payment for that time.

DuPont alleged that it owed nothing more to the employees. DuPont argued that it paid the employees for the three breaks in each shift – even though the FLSA did not require it to do so – and, therefore, DuPont compensated the workers for 12 hours when they were really working for only ten and one-half hours each shift. Thus, DuPont

argued, even if the pre- and post-shift activities were compensable, that time should be offset against the compensated breaks, and because the total break time always exceeded the donning, doffing, and shift-relief, plaintiffs were not entitled to anything more. Even including the time spent preparing and winding down from the shift, the employees never worked more than 12 hours and always got paid for 12 hours.

The United States District Court for the Middle District of Pennsylvania agreed with DuPont's argument and dismissed the lawsuit, finding that the FLSA did not specifically prohibit offsetting the pre-and post-shift time with the paid break time. On appeal, the Third Circuit reversed the district court's ruling, disagreeing with the notion that silence indicates permission.

DuPont treated the compensation for breaks similarly to other types of compensation given to employees. It included this compensation in calculating employees' regular rate of pay,³ and the break time was included on employees' paystubs as part of their total hours worked each week.

The Court held that, at the point at which compensation is included in the regular rate (regardless of whether the FLSA requires its inclusion), an employer may not use that compensation to offset other compensation owed. The Court found convincing an argument from the Department of Labor, which filed a brief in support of the plaintiffs in the appeal, that

compensation already paid for hours of work cannot be used as an offset and thereby be counted *a second time* as statutorily required compensation for other hours of work.

The Court held that the FLSA provides for an offset using only compensation paid at a premium (not regular) rate of pay, such as pay for working (1) more than eight hours in a day; (2) on weekends or holidays; or (3) outside regular hours, as established in a collective bargaining agreement.

This decision highlights the importance of ensuring that non-exempt employees' work time is properly tracked and paid. If the FLSA does not expressly authorize a pay practice, it may be found unlawful, even if the employer has good intentions and is attempting to exceed the law's requirements.

Please contact Jason Roberts or John Allegretto for more information on this article, the FLSA, or to discuss your company's pay practices.

³ An employee's "regular rate of pay" is a rate per hour that is determined by dividing the total remuneration for employment (except statutory exclusions) in any workweek by the total number of hours s/he actually worked in that workweek for which such compensation was paid.