



CLIENT ALERT

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FLEXIBLE BREAK TIME IS TOO RIGID: Third Circuit Says Employers Must Pay Employees for All Short Breaks

As we reported in our January 11, 2016 Alert, *Give Me A Break (And Pay For It)*¹, the United States District Court for the Eastern District of Pennsylvania held that federal labor law requires employers to pay their employees for *all* breaks of 20 minutes or less.² Last Friday, the United States Court of Appeals for the Third Circuit affirmed the decision of the District Court, solidifying employers' obligation under federal law to compensate employees for all working time.³

Section 206 of the Fair Labor Standards Act ("FLSA") mandates that employees receive at least minimum wage for time spent working.⁴ Simultaneously, Section 785.18 of the Code of Federal Regulations ("CFR") states that short breaks ranging from five minutes to 20 minutes must be counted as compensable working time.⁵ Breaks of this nature are considered "common in industry" and "promote the efficiency of the employee."⁶

In *American Future Systems*, the Third Circuit was faced with determining whether the FLSA and the CFR prohibit employers from eliminating paid break time in favor of

a "flexible time" system, where employees are entitled to take as much break time as they want, but without pay during those times.

American Future Systems, d/b/a Progressive Business Publications ("Progressive"), is a business publication and distribution company located in suburban Philadelphia. Progressive pays its sales representatives on an hourly basis and distributes bonuses on a sales-per-hour basis. Sales representatives are compensated only for "working time," when they are logged onto their computers at their workstations. They are required to log off when they leave their workstation for any reason.

Previously, Progressive had a policy that gave its representatives two 15-minute paid breaks per day. In 2009, the company eliminated paid breaks and implemented a flexible time system instead. Under this system, representatives were entitled to take as much break time as they pleased, but would not be paid for any break lasting longer than 90 seconds, including coffee and bathroom breaks.

¹ <http://www.rubinfortunato.com/article/give-break-pay/>.

² *Perez v. Am. Future Sys.*, No. 12-6171, 2015 U.S. Dist. LEXIS 167942 (E.D. Pa., Dec. 16, 2015).

³ *Sec'y United States Dep't of Labor v. Am. Future Sys.*, No. 16-2685 (3d Cir. 2017).

⁴ 29 U.S.C. § 206(a)(1)(c).

⁵ 29 C.F.R. § 785.18.

⁶ *Id.*

After catching wind of Progressive's system, in 2011, the United States Department of Labor ("DOL") filed suit against Progressive in the Eastern District of Pennsylvania, alleging violations of the FLSA by failure to conform to the CFR.⁷ Specifically, the DOL argued that the CFR creates a bright-line rule that employers must pay employees for *all* breaks of 20 minutes or less.⁸ Failure to do so constitutes a failure to pay wages for compensable working time, and thus violates the FLSA's minimum wage requirement. According to the DOL, Progressive's flexible time system effectively deprived representatives of compensation for any break time, regardless of duration or purpose, and therefore violated the FLSA.⁹

Progressive argued that the DOL was attempting to enforce the wrong regulation under the CFR, and that Section 785.16, rather than 785.18, was applicable. Section 785.16 states that breaks taken solely for the employee's personal benefit need not be counted as compensable working time.¹⁰ Progressive argued that, because its system does not place any obligation on representatives to return to their workstations to continue working after breaks, representatives are completely relieved of all work-related duties during break time, and are therefore "off duty"

⁷ See Perez, 2015 U.S. Dist. LEXIS 167942.

⁸ This position was in line with the official interpretation of the DOL's Wage and Hour Division, though as indicated at oral argument, the courts have never applied this interpretation to a radical flexible time system like the one Progressive implemented.

⁹ The DOL also argued that Progressive violated Section 211 of the FLSA by failing to properly maintain mandatory time records.

¹⁰ 29 C.F.R. § 785.16.

¹¹ The Third Circuit noted that, although theoretically, a bright-line application of Section 785.18 enables employees to take an unlimited

amount of 19 minute paid breaks during a workday, in practice an employer has, as recourse, the power to discipline or terminate an employee. Withholding compensation is never an appropriate remedy.

amount of 19 minute paid breaks during a workday, in practice an employer has, as recourse, the power to discipline or terminate an employee. Withholding compensation is never an appropriate remedy. The District Court ruled in favor of the DOL, holding that Section 785.18 was the applicable regulation and should be construed as a bright-line rule requiring pay for all breaks less than 20 minutes, regardless of whether the breaks benefit employers.

On appeal, Progressive again argued that the FLSA was not applicable because Section 785.16 dictated that flexible time is not compensable break time, but added that the District Court erred in giving substantial deference to the DOL's interpretation of Section 785.18 as a bright-line rule trumping the more general guidance of Section 785.16.

The Third Circuit affirmed the District Court's holding,¹¹ finding that it was appropriate to give substantial deference to the DOL's interpretation and, as a result, the FLSA did apply.¹² It explained that the FLSA is a "humanitarian and remedial legislation" and "has been liberally interpreted."¹³ Employers are not required to have a break policy, but if they do, the FLSA requires that employees be properly compensated.¹⁴ An employer cannot simply avoid this obligation by mischaracterizing

amount of 19 minute paid breaks during a workday, in practice an employer has, as recourse, the power to discipline or terminate an employee. Withholding compensation is never an appropriate remedy.

¹² To determine the level of deference to afford the DOL, the court considered agency expertise, consistency of interpretation, and contemporaneousness of interpretation.

¹³ See American Future Systems at 10.

¹⁴ The Court further explained that the DOL's set limit of 20 minutes exists because the DOL believes that breaks of such a duration primarily benefit the employer, as employees are able to refresh and

breaks as flexible time off. Progressive’s policy made such a mischaracterization, forcing employees to “choose between such basic necessities as going to the bathroom and getting paid unless the employee can sprint from the computer to the bathroom, relieve him or herself while there, and then sprint back to his or her computer in less than ninety seconds.”¹⁵ As a result, Progressive’s flexible time system was “absolutely contrary to the FLSA.”¹⁶

the obligations that result, in line with the liberal interpretation of the DOL. As a result, employers, especially in Pennsylvania, New Jersey, and Delaware, need to fulfill their obligation to pay employees for all breaks under 20 minutes, regardless of whether the breaks are prescribed under a traditional time system or allotted under a flexible time system.

The Third Circuit’s precedential ruling brings the Circuit’s conception of the interplay between the CFR and FLSA, and

refocus to continue working at an optimal level. This justifies the need to provide compensation. The deference towards the DOL’s interpretation of

Section 785.18 as a bright-line rule is a separate matter of administrative law addressed in FN 12.

¹⁵ See American Future Systems at 9.

¹⁶ Id.

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