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Compensability of Waiting Time, Rest and Meal Periods, and Training Under the FLSA

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This article addresses whether waiting time,[1] meal and rest periods, and training time are compensable under the FLSA. The general applicable regulations and controlling law are addressed under each issue and examples of recent applications of these principles are presented.

I. Compensability For Waiting Time

Whether time spent waiting (idling or performing personal tasks) is compensable under the FLSA minimum wage and overtime provisions of the FLSA depends on the particular circumstances. *See* 29 C.F.R. §785.14. Determining whether the waiting time is compensable involves "scrutiny and construction of the agreements between particular parties, appraisal of their practical construction of the working agreement by conduct, consideration of the nature of the service, and its relation to the waiting time, and all of the circumstances. Facts may show that an employee was engaged to wait or that he waited to be engaged." *Skidmore v. Swift & Co.*, 323 U.S. 134, 137 (1944). Time spent waiting for work is compensable if it is spent "predominantly for the employer's benefit." *Armour & Co. v. Wantoc*, 323 U.S. 126, 133 (1944).

In determining whether the work was predominantly for the employer's benefit, courts examine the amount of control that the employer has over the employee during the

[1] Waiting time in cases where the employee is "on call" and where the employee resides on the premises of the employer are not addressed herein.

waiting time and whether the employee can effectively use that time for his or her own purposes. *See* E. Kearns, The Fair Labor Standards Act, § 8.III.B (1999). Waiting time while on duty is included in compensable time, especially when it is unpredictable or is of such short duration that the employees cannot use the time effectively for their own purposes. *Id*. If an "employee is completely relieved from duty" for a period "long enough to enable him to use the time effectively for his own purposes," this time period will not be considered hours worked. *See* 29 C.F.R. §785.16(a).

Waiting time may be excluded from compensable time if it precedes the first principal activity of the day or occurs after the last principal activity of the day. For example, in *IBP, Inc. v. Alvarez*, 546 U.S. 21, 40-41 (2005), the Supreme Court held that the time spent by employees waiting to don their work clothes and protective equipment, is not compensable because it occurred prior to the first principal activity of donning integral and indispensable gear. The Court found that this waiting time was excluded from compensable time under the Portal to Portal Act, 29 U.S.C. § 254(a)(2). *Id.* The Court acknowledged that under the Department of Labor Regulation, 29 C.F.R. § 790.7(h), if the employee "is required by his employer to report at a particular hour at his workbench or other place where he performs his principal activity, if the employee is there at that hour ready and willing to work but for some reason beyond his control there is no work for him to perform until some time has elapsed, waiting for work would be an integral part of the employee's principal activities." *Id*. at 41. The Court found that this regulation would be applicable if the company had required its workers to report to the changing area at a specific time only to find that no protective gear was available until after some time had elapsed. *Id*.

In *Chao v. Akron Insulation & Supply, Inc*., 184 Fed. Appx. 508, 2006 U.S. App. LEXIS 14566 (6th Cir. 2006), the Sixth Circuit affirmed a ruling by the district court that time spent by employees drinking coffee and socializing was compensable where the testimony established that employees arrived early and clocked in because they were required to be at the shop at a certain time to do work before leaving for a job site. Specifically, the court found that the employer required employees to report at designated times to receive assignments, assemble crews, load company-owned vehicles, and to drive trucks to the job sites. Thus, the court found that the pre-shift time was integral and

indispensable to the performance of the employees' principal activity of installing insulation at off-site locations. The court further noted that although several employees testified that, on occasion, they did not immediately have work to do, this time was compensable because the employees were waiting for assignments or other crew members to arrive, thus, the time was still spent for the employer's benefit.

In *Alexander v. Wackenhut Corp.*, 2008 U.S. Dist. LEXIS 50070, *9-10 (E.D. La. July 1, 2008), the district court granted summary judgment for the employer finding that the time spent waiting to enter the armory where the security officers were employed is not compensable under the FLSA because it is a preliminary activity excluded by the Portal-to-Portal Act. The court refused to grant summary judgment for either party for the time spent waiting for roll call *after* the officers donned protective gear (a principal activity that would typically start the clock under the continuous work day rule). *Id.* at 10-11. The court noted that the company benefited by having the officers ready to promptly assume their posts after the roll call was completed. The court indicated that although the waiting time occurred after a principal activity, it was still possible that the waiting time would be found to be non-compensable because there was some testimony that after the officers donned their protective gear, they were allowed to eat, drink, socialize, and return to their vehicles for periods that may have lasted more than 30 minutes.

In *Bull v. U.S.*, 479 F.3d 1365, 1380 (Fed. Cir. 2007), the Federal Circuit concluded that the plaintiffs were "engaged to wait" during times they spent laundering towels used by drug sniffing dogs because their activities during the downtime "were significantly limited by their need to monitor their running washers -- appliances capable of overflowing -- and running dryers -- appliances capable of causing fires."

II. Compensability of Rest and Meal Breaks

The standard for compensability of rest and meal periods is established in the FLSA regulations at 29 C.F.R. §§ 785.18-19. The principles these regulations embody as to rest and meal periods are applicable, even though there may be a custom, contract, or

agreement not to pay for the time so spent.[2] *See*, 29 C.F.R. § 785.8. However, courts have modified these advisories, especially with respect to meal periods.

A. Rest Periods

The FLSA does not require employers to grant rest periods. If an employer does grant break periods, those of a short duration, of five to about twenty minutes, must be counted as hours worked pursuant to 29 C.F.R. § 785.18. For instance, in *Ballaris v. Wacker Siltronic Corp.*, 370 F.3d 901, 913 n. 18 (9th Cir. 2004), the Ninth Circuit reversed and remanded, holding that twenty minute paid rest periods provided by an employer were to be included as hours worked (where one-half of the rest period was used for donning and doffing "bunny suits").

B. Meal Periods

Bona fide lunch or meal periods are not considered to be compensable time pursuant to 29 C.F.R. § 785.19. For a meal period to be *bona fide*, the regulation states that it ordinarily must last at least thirty minutes, and the employee must be completely relieved from duty, both active and inactive. *See id.* However, the "completely relieved of duty" standard has not been applied literally and most courts focus on whether the meal period is not predominantly for the benefit of the employer.

For example, in *Berger v. Cleveland Clinic*, 2007 U.S. Dist. LEXIS 76593 **47-48 (N.D. Ohio September 29, 2007), a district court held that even where the total of thirty minutes for lunch are not received continuously without interruption, a lunch break can be considered *bona fide, so long as* the time is spent predominantly for the employee's benefit.

1. "Completely Relieved From Duty' Test

To be "completely relieved from duty," employees cannot be subject to "significant affirmative responsibilities" during the meal period. *Kohlheim v. Glenn County*, 915 F.2d 1473, 1477 (11th Cir. 1990). The "essential consideration" is whether the employees "are in fact relieved from work for the purpose of eating a regularly scheduled meal." *See Chao v. Tyson Foods, Inc.*, 2008 U.S. Dist. LEXIS 29950, *11-12

[2] Agreements may be entered into as to compensation for meal periods. Where the parties have agreed to exclude the meal period from hours worked, then any payments for the mean period are an additional benefit for employees and not compensation for hours worked, may be excluded from computation from the regular rate. *See, Ballaris v. Wacker Siltronic Corp*, 370 F.3d 901, 909 (9th Cir. 2004).

(N.D. Ala. January 22, 2008). Analysis under the "completely relieved from duty standard" requires courts to examine whether the rest break is allotted "for the purpose of eating a regularly scheduled meal," employees retain "significant affirmative responsibilities" during the meal period, and whether the employees are subject to "real limitations on their freedom" during the period which inure to defendant's benefit. See *Id.* at * 17. Although "thirty minutes or more" ordinarily amounts to a sufficient break to constitute non-compensable time, the applicable regulation notes that a shorter period may suffice "under special circumstances."[3]

2. Predominant Benefit Test

Notwithstanding the advisory language in section 785.19, most circuits have modified the "completely relieved from duty" element of this regulation and supplanted it with a judicially devised "predominant benefit" test.[4] The Department of Labor itself has rejected a broad, literal construction of the "completely relieved from duty" language. *See Hahn v. Pima County*, 24 P.3d 614, 618 (Ariz. App. 2001)

In *O'Hara v. Menino*, 253 F.Supp.2d 147, 157 (D. Mass. 2003), a federal district court surveyed the circuits and followed the "predominant benefit" test in the absence of a directive from the First Circuit. The Court stated that the "key" to its determination that the meal break time of the police patrol officers in question was not spent predominantly for the benefit of the employer was the frequency of interruptions. Officers were infrequently required to terminate their meal period or remain in their patrol vehicle during their meal period.

In *Reich v. Southern New Engl. Telecommunications Corporation*, 121 F.3d 58, 64 (2d Cir. 1997), the Second Circuit rejected the "completely relieved from duty" test as inconsistent with controlling Supreme Court precedent defining "work" as being time spent

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[3] *Id. See WH Op. Ltr.*, 99:8329 (recognizing exception to compensability requirement in section 785.19 for a meal period of only 15 minutes); *Blain v. General Elec. Co.*, 371 F. Supp. 857, 860–62, 20 WH Cases 85 (D. Ky. 1971) (18-minute meal period not compensable where employees expressly chose period length and evidence indicated that employees had sufficient time to eat).

[4] According to the District Court's survey in *Chao v Tyson Foods*, 2008 U.S. Dist. LEXIS 29950, *11-12, the Eleventh Circuit is "an anomaly among the Circuits in its application of the completely relieved from duty standard to § 785.19 claims." *But see, Avery v. City of Talladega, Ala.*, 24 F.3d 1337, 1344-47 (11th Cir. 1994) (applying to law enforcement officers the predominant benefit test under 29 C.F.R. § 553.223 subject to section 7(k) of the FLSA. *See e.g., Barefield v. Village of Winnetka*, 81 F.3d 704, 3 WH Cases 353 (7th Cir. 1996) (meal periods not work merely because police department paid officers for 30-minute lunch when that time not spent predominately for benefit of employer).

predominantly for the benefit of the employer and indicated that the Secretary of Labor "conceded that the test [under § 785.19] is not so rigid" as to require the employee to be completely relieved of duty. In applying the predominant benefit test to this case, the Second Circuit held that the employees were entitled to compensation for their lunch breaks because they were required to take half-hour lunches at specified times, were not allowed to leave the job site (for safety reasons and to forestall loss of equipment), were required to bring their own lunches, and their lunches were frequently interrupted. *Id.* at 65-66.

In *Oakes v. Pennsylvania*, 871 F.Supp. 797, 799-800 (M.D. Pa. 1995), the district court elected to follow the "predominantly for the benefit of the employer" standard although the Third Circuit has not addressed the issue of the appropriate interpretation of section 785.19. The Court found that the officers time was spent predominantly for the benefit of defendant where they were required to remain in uniforms, carry their weapons, monitor their radios, respond to emergency calls, remain in the jurisdiction, and prohibited from consuming alcoholic beverages, even though they could sleep, read, play games, watch television, and go to restaurants within the jurisdiction. *Id*. at 800.

The Fourth Circuit affirmed application of the predominant benefit test in *Roy v. County of Lexington*, 141 F.3d 533, 545 (4th Cir. 1998) to a district court's ruling that emergency medical service paramedics and technicians were not entitled to compensation for meal periods. Defendants had proven at trial that paramedics had no official responsibilities during the meal periods other than to respond to emergency calls and that they were permitted to go anywhere within their response zone during their meal periods.

In *Bernard v. IBP Inc.*, 154 F.3d 259 (5th Cir. 1998), the Fifth Circuit affirmed a verdict for maintenance workers in a beef processing plant who contended that their meal periods were compensable in light of frequent interruptions to perform maintenance work. The Court applied the "predominant benefit" test to analyze meal period compensability. The Court stated that the "critical issue for determining whether the meal breaks were compensated "is whether the employee can use the time effectively for his or her own purposes."

The Sixth Circuit affirmed the district court's application of the "predominant benefit" to determine the compensability of meal periods in *Myracle v. General Electric*

Co., 1994 U.S. App. LEXIS 23307, *10-13 (6th Cir. 1994) and its finding of noncompensability. The Court observed that an analysis of compensability rests not simply upon whether the employer receives a benefit but whether plaintiffs are engaging in substantial duties during their meal periods, observing that plaintiffs were free to choose the time and place of their meal periods and were not required or allowed to perform their work duties during this time. *Id*. at 15-16. The Court found occasional interruptions to be *de minimis* and non-compensable. *Id*.

The Seventh Circuit applied the predominant benefit test to lunch break claims, reversing and remanding the case for additional findings on whether police officers could pass their meal time comfortably even though their attention was devoted to official responsibilities. *See*, e.g., *Alexander v. City of Chicago*, 994 F.2d 333, 337 (7th Cir. 1993) (police officer case but without language limiting holding.)

The Eighth Circuit has also rejected the "completely relieved from duty" standard in favor of what it described as a more "practical, realistic approach" to determining the compensability of meal periods. *See*, *Hertz v. Woodbury County*, 2008 U.S. Dist. LEXIS 40003 (N.D. Iowa May 16, 2008) (denying summary judgment as to compensability of meal times where frequency and length of interruptions to receive phone calls, monitor radios and respond to emergencies was in dispute) *citing Henson v. Pulaski County Sherriff Dep't.*, 6 F.3d 531, 534 (8th Cir. 1993) (affirming summary judgment in favor of police department on holding that police officers, who could go wherever they pleased and could and did attend to personal errands during their 30-minute meal periods, were not entitled to compensation for meal times where the only potential restrictions on their use of meal periods involved the possibility that citizens might ask them questions and that they monitored radios for emergency calls).

In *Chavez v. IBP, Inc.*, 2005 U.S. Dist. LEXIS 29714 ** 41-43 (E.D. Wash. May 16, 2005), a federal district court in the Ninth Circuit held that the plaintiffs' meal breaks, interrupted by donning and doffing, were compensable under 29 C.F.R. § 785.19(a), citing to a Ninth Circuit case which followed the "completely relieved from duty" standard, *Brennan v. Elmer's Disposal Serv., Inc.*, 510 F.2d 84, 88 (9th Cir. 1975), and *Reich v. Southern New Engl. Telecommunications Corporation*, which rejected the "completely relieved from duty" test.

In an unpublished decision, the Tenth Circuit Court of Appeals stated in *Beasley v. Hillcrest Medical Center*, 78 Fed. Appx. 67, 70-71 (10th Cir. 2003) that the question is not whether employees' meal periods were interrupted, but whether the degree of interruption caused them to spend their meal periods primarily for the employer's benefit.[5] In *Beasley*, the Tenth Circuit reversed summary judgment for the employer, finding that plaintiff nurses and technicians had raised a triable issue of fact as to the compensability of interrupted lunch periods where they proved frequent interruptions to respond to calls, provide patient care, watch monitors and were restricted as to where they could eat. *Id*.

3. Burden of Proof

In the Sixth Circuit, the employee bears the burden to prove that the normally non-compensable meal period should be compensable because it is spent predominantly for the employer's benefit. *Berger v. Cleveland Clinic Found.*, 2007 U.S. Dist. LEXIS 76593 (N.D. Ohio September 29, 2007) (denying summary judgment to employer where it lacked knowledge about alleged uninterrupted lunches) *citing Myracle v. General Electric Co.*, 1994 U.S. App. LEXIS 23,307 (6th Cir. 1994) (*citing Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 686-87 (1946)). *See also, Hill v. United States*, 751 F.2d 810, 814 (6th Cir. 1984) (stating that "as long as the employee can pursue his or her mealtime adequately and comfortably, is not engaged in the performance of any substantial duties, and does not spend time predominantly for the employer's benefit, the employees is relieved of duty and not entitled to compensation under the FLSA").

However, the Fifth Circuit has taken the position that the burden of proof is on the employer to show that a meal period is primarily for the employee's benefit. *See Bernard v. IBP Inc.*, 154 F.3d 259 (5th Cir. 1998) (applying "predominant benefit" test and stating that "critical issue for determining whether the meal breaks were compensated "is whether the employee can use the time effectively for his or her own purposes").

[5] *But see Bennett v. Albuquerque*, in which Tenth Circuit affirmed that prison officers were entitled to compensation for 30-minute meal breaks because they were required to engage in work-related activities to the extent they were restricted from leaving the facility and were frequently disturbed during lunch breaks. 1995 U.S. App. LEXIS 8901 (10th Cir. 1995).

III. Compensability of Training Time

Whether an individual is a "trainee" not protected under the FLSA, as opposed to an "employee" who is entitled to protection, depends upon whether an employment relationship between the parties exists. The FLSA does not define "trainees." However, the FLSA does broadly define "employees" as "any individual employed by an employer," 29 U.S.C. 203(g), and broadly defines "employ" as including "to suffer or permit to work," 29 U.S.C. 203(e). Notwithstanding these expansive definitions related to employment, not all trainees who perform work for an employer will be considered employees within the meaning of the FLSA.

A. *Portland Terminal*

The Supreme Court in *Walling v. Portland Terminal Co.*, 330 U.S. 148 (1947), recognized "[t]he definition 'suffer or permit to work' was obviously not intended to stamp all persons as employees who, without any express or implied compensation agreement, might work for their own advantage on the premises of another." In *Portland Terminal*, the railroad had established a course of "practical training to prospective yard brakemen." *Id*. at 149. The railroad never accepted a yard brakemen applicant until training was completed. During the training period, which lasted 7 to 8 days, the yard brakemen trainee was under the close supervision of a yard crew and would learn by on-the-job observation. Gradually, the trainee was permitted to perform some actual work under close scrutiny of the yard crew. The Court determined that the yard brakemen trainees were not employees under the meaning of the FLSA, finding:

> [The trainees] activities do not displace any of the regular employees, who do most of the work themselves
>
> . . .
>
> The applicant's [trainees] work does not expedite the company business, but may, and sometimes does, actually impede and retard it.
>
> . . .
>
> [F]indings do not indicate that the railroad ever undertook to pay, or the trainees ever expected to receive, any remuneration for the training period
>
> . . .

> Had these trainees taken courses in railroading in a public or private vocational school, wholly disassociated from the railroad, it could not reasonably be suggested that they were employees of the school within the meaning of the Act.
>
> . . .
>
> [T]he railroads receive no 'immediate advantage; from any work done by the trainees.

The Court noted that despite the fact that the training program benefits the employer by creating a pool of qualified workers; the Act "cannot be interpreted so as to make a person whose work serves only his own interest an employee of another person who gives him aid and instruction." *Id*. at 153.

B. The DOL Six-Factor Test

The Department of Labor's Wage and House Division Administrator (hereinafter, "Administrator") derived a six-part test from the factors enunciated by the Supreme Court in *Portland Terminal* and its companion case *Walling v. Nashville, Chattanooga and St. Louis Ry.*, 330 US 158 (1947) to assist in the determination of whether an employment relationship exists between an employer and trainee. *See* Wage & Hour Manual (BNA) 91:416 (1975). Several federal circuits have relied on the Administrator's test for guidance. *See e.g., Donovan v. American Airlines, Inc.*, 686 F.2d 267 (5th Cir. 1982); *Reich v. Parker Fire Protection District*, 992 F.2d 1023 (10th Cir. 1993); *Archie, et al. v. Grand Central Partnership, Inc., et al.*, 997 F. Supp. 504 (S.D.N.Y. 1998).

According to the Administrator, whether trainees are employees "will depend upon all the circumstances surrounding their activities on the premises of the employer. If all the criteria apply, the trainees . . . are not employees within the meaning of the FLSA." Department of Labor, Wage & Hour Division, Field Operations Handbook, Section 10b11; *see also* Wage & Hour Manual at 91:416; *Donovan*, 686 F.2d at 272.

The Administrator's six-factor test sets forth the following criteria:

> (1) the training, even though it includes actual operation of the facilities if the employer, is similar to that which would be given in a vocational school,
>
> (2) the training is for the benefit of the trainees,

(3) the trainees do not displace regular employees, but work under close observation,

(4) the employer that provides the training derives no immediate advantage from the activities of the trainees and on occasion his operations may actually be impeded,

(5) the trainees are not necessarily entitled to a job at the completion of the training period, and

(6) the employer and the trainees understand that the trainees are not entitled to wages for the time spent in training.

C. Applications of *Portland Terminal* and DOL's Six Factor Test

Although the DOL takes the position that all six-factors must be satisfied for an individual to be a trainee and not an employee within the meaning of the FLSA, most courts have not rigidly applied the Administrator's six-prong test. The Tenth Circuit Court of Appeals, in *Reich v. Parker Fire Protection District*, 992 F.2d 1023, rejected the Secretary's position that the Administrator's six-factor test must be strictly applied. In *Reich*, the district court[6] granted summary judgment for the Defendant finding that firefighter trainees were not employees during their training period even though the court found that the trainees expected employment upon completion of the training course. On appeal, the Secretary argued that unless all factors of the Administrator's six-part test are met, the trainees are not employees under the FLSA. The Court disagreed with the Secretary and stated that *Portland Terminal* did not support an "all or nothing approach" for determining when a trainee is an employee under the FLSA, nor did the Administrator, citing opinion letters from the 1960's.

Similarly, in *Archie*, 997 F. Supp. at 532, a district court in the Southern District of New York recognized that neither *Portland Terminal* nor the Administrator's test, "relies exclusively on a single factor, but instead requires consideration of all the circumstances;" suggesting a totality of the circumstances approach. Moreover, the court recognized that the factors enumerated by the Administrator "are not exhaustive and are intended to be consistent with *Portland Terminal*." *Id*.

[6] *Martin v. Parker Fire Protection Distric*t, 774 F. Supp. 1301 (D. Colo. 1991).

The Fourth Circuit Court of Appeals, in *McLaughlin v. Ensley*, 877 F. 2d 1207, 1209 (4th Cir. 1989), after evaluating *Portland Terminal* and its fourth circuit progeny, determined that the test for determining whether a trainee is entitled to the protections of the FLSA, is not a six-prong test, but the general test of "whether the employee or the employer is the primary beneficiary of the trainees' labor."

D. Evaluating the Factors Case by Case

As courts have differed in their application of the factors enunciated in *Portland Terminal* and in their application of the Administrator's six-factor test, the analysis of whether a trainee is an employee under the FLSA is best reviewed on a case by case basis. The following are several frequently cited and some recent cases for a general review of how "trainee" cases have been decided.

The Fourth Circuit Court of Appeals in *McLaughlin v. Ensley*, 877 F. 2d 1207, 1209 (4th Cir. 1989), determined that route driver trainees were employees under the FLSA. The trainees were required to participate in a week long orientation, during which they rode with employees to learn the employer's business. The route driver trainees "loaded and unloaded trucks, restocked retail store shelves and vending machines, learned basic food vending machine maintenance, and performed simple paperwork." *Id*. at 1210.

The court found that the employer received the principal benefit from the labor performed by its trainees. The court stated:

> [I]t becomes plain that Ensley received more advantage than the workers, Ensley, without cost to himself, obtained employees able to perform at a higher level when they began to receive pay, Ensley also received a free opportunities to review job performance, and he received the benefit of aid to his regular employees while they performed their normal duties. *Id*. at 1210.

In addition, the court was persuaded by the fact that there was no credible evidence that any trainee was not hired following completion of the training period, which supported a finding that the route drivers should have been considered as employees from the very beginning.

The Fifth Circuit Court of Appeals in *Donovan v. American Airlines, Inc.*, 686 F.2d 267 (5th Cir. 1982), found the American Airlines' flight attendant trainees and

reservation sales agent trainees who participated in two to five weeks of unpaid training were not employees under the FLSA. The trainees were required to attend classes at a learning center. Trainees learned about techniques that are similar across the airline industry and about policies and practices unique to American Airlines. The trainees had no direct contact with customers during the training period. Although not guaranteed a job at the completion of the training program, most trainees were hired, as the Airline spent a significant amount of money to train these individuals and was careful to evaluate supply and demand for these positions. No trainee supplemented, or replaced, an existing employee. All employees, regardless of qualifications or experience, were required to attend the training courses.

The court recognized that although the Airline benefited from training flight attendants and reservation sales agents by obtaining "suitable personnel" and training them on their Airlines policies and practices, it agreed with the findings of the district court that the trainees received the greater benefit from the training experience. Moreover, the court determined that the Airline received no immediate benefit from the trainees' activities at the learning center. In reaching its decision, the appellate court found that the Airline's practices were similar to those of the railroad in *Portland Terminal* and found that the Airline had satisfied each prong of the Administrator's six-factor test.

The Tenth Circuit Court of Appeals in *Reich v. Parker Fire Protection District*, 992 F.2d 1023 (10th Cir. 1993), determined that the firefighter's in training were not employees. Following a written and physical examination, all firefighter were required to successfully complete a ten week course of training prior to hire. Firefighter trainees understood that they would not be paid during the training period. The training program included classroom lectures, tours of the district, physical training, and simulations. The trainees were also required to maintain the Defendant's equipment. In addition, the Plaintiff trainees at issue were also required to staff a truck that was previously maintained by volunteers and on one occasion responded to an accident and provided paramedical services.

The appellate court upheld the district court's determination that the firefighters in training were not employees within the meaning of the FLSA. The court found that the

Defendant's training program was similar to that of the trainees in *Donovan v. American Airlines*. In both training programs, the trainees were taught vocational skills transferable in the industry with an emphasis on the employer's practices; the trainees understood they would not be paid; the trainees did not displace employees; and the employer received no immediate benefits from the trainees' activities. The Tenth Circuit Court found that the district court properly applied the Administrator's six-factor test to access the totality of the circumstances, holding that "the six criteria are relevant but not conclusive to the determination of whether these firefighter trainees were employees under the FLSA." *Id*. at 1027. The court found that except for the fact that the trainees expected to be hired following completion of the training program, "the six-factor test clearly indicated that the trainees were not employees." *Id*. at 1029. This one factor did not sway the court's determination that the trainees were not employees.

A district court in the Second Circuit in *Archie, et al. v. Grand Central Partnership, Inc., et al.*, 997 F. Supp. 504 (S.D.N.Y. 1998), found that homeless and previously homeless individuals who participated in a twelve week training programs to help them get back on their feet were employees under the FLSA. The trainees performed maintenance, food preparation, and clerical work for the Defendant's outreach program. Trainees also performed work as security guards for ATM vestibules and for a recycling program with the World Trade Center. In addition, trainees could be asked to perform special assignments for outside companies. Some trainees spent more than 1,000 hours participating in the training program for sub-minimum wage compensation. The district court recognized that, although the trainees in the program "benefited enormously from the work opportunities . . . . [because] [a]s homeless individuals [they] needed to be instructed on the most basic of job skills," the Defendant benefited more. *Id*. at 533. The district court found that the trainees did displace the need for the Defendant to compensate other employees for the work trainees performed, that the trainees often did not perform work under "meaningful supervision," and that the trainees did not understand that they were not entitled to wages. *Id*. Moreover, the court found that the Defendants could not have met their contractual obligations without the trainees. Thus, the court found that even though the trainees benefited from the training program, the

Defendants received an immediate and greater advantage from the trainees' activities and as such were employees within the meaning of the Act.

More recently, a district court in the tenth circuit in *Chellen, et al. v. Pickle,* 344 F. Supp. 2d 1278, (N.D. Okla. 2004), relied on the "*Reich* test," which incorporates the Administrator's six-factor test, in finding that skilled workers recruited from India to work in the Defendant's facility were employees and not trainees under the FLSA. The court stated that the *Reich* test is based upon "a totality of the circumstances" analysis and "the economic realities of the relationship." In evaluating the trainees' employment situation, the court found that the Defendant's training program "did not involve . . . any coursework, assignments, or duties typical of a vocational school." *Id*. at 1288. The program was not designed to benefit the trainee, as most of the trainees were experienced skilled workers. The Defendant's used the trainees for production, maintenance, and menial labor that displaced other employees who would otherwise need to perform this work, as the trainees often worked under minimal supervision. Moreover, the Defendant bragged that the use of trainees allowed the Company to secure production contracts and increase the Company's ability for expansion. The Defendant also benefited from the menial tasks the trainees performed. The trainees had expected long term employment and believed they were employees entitled to wages. The trainees were not familiar with minimum wages laws in the United States. The court determined that the Defendant failed to meet any of the Administrator's factors, and that under the *Reich* test the individuals were not "trainees" but employees under the FLSA.

In *Herman v. Hogar Praderas de Amor, Inc.*, 130 F. Supp. 2d 257 (D.P.R. 2001), a district court in the first circuit, found that nurse aides, and maintenance/laundry and kitchen workers, who were required to participate in an unpaid two-day training program, during which little to no instruction was given and regular work was preformed, were employees during this training period and should be compensated as such. The court recognized that some courts have used the Administrator's six-factor test to evaluate whether a trainee is an employee entitled to coverage under the FLSA, but that the parties to this action did not mention this test; and that regardless of its application, the court's finding would be the same.

Also, the Sixth Circuit Court of Appeals in *Chao v. Tradesmen Internationa*l, Inc., 310 F.3d 904 (6th Cir. 2002), relying on *Ballou v. General Electric Co*., 433 F.2d 109 (1st Cir. 1970) and citing *Portland Terminal*, determined that the Defendant who required completion of an OSHA training course as pre-condition of employment, but offered immediate employment and compensation to an applicant that agreed to register for the OSHA program with 60 days of hire and completed the course within a reasonable period of time, was not required by the FLSA to compensate their employees for time spent completing the required OSHA program as opposed to when they were working.

Conclusion

The compensability of waiting time, meal and rest periods and trainee time in most circuit courts are determined by a totality of the circumstances with the courts trying to determine whether the time worked is predominantly for the benefit of the employer.