

# Ninety Seconds Is Not Enough: Third Circuit Rules That Break Policy Violates the FLSA

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In *Secretary United States Department of Labor v. American Future Systems, Inc.*, No. 16-2685 (October 13, 2017), the Third Circuit Court of Appeals considered whether an employer's failure to compensate employees for periods of 20 minutes or less time when they were relieved of all work-related duties violated the Fair Labor Standards Act (FLSA).

In *Secretary United States Department of Labor v. American Future Systems, Inc.*, No. 16-2685 (October 13, 2017), the Third Circuit Court of Appeals considered whether an employer's failure to compensate employees for periods of 20 minutes or less time when they were relieved of all work-related duties violated the Fair Labor Standards Act (FLSA). The Third Circuit held that the FLSA requires employers to compensate employees for breaks of 20 minutes or less, and rejected the employer's contention that under the employer's "flexible time" policy, such non-work periods did not constitute breaks within the meaning of the law.

## Background

American Future Systems d/b/a Progressive Business Publications employed sales representatives who were paid a base hourly wage and qualified for bonuses and additional compensation based upon work they performed while logged onto computers at their work stations. In 2009, Progressive Business Publications eliminated a policy that allowed its sales representatives to take two 15-minute paid breaks per day. Under Progressive Business Publications' new policy, employees were permitted to determine the frequency, length, and time of their breaks. Although employees were allowed to take breaks for any reason, Progressive Business Publications paid its sales representatives only for interruptions lasting less than 90 seconds.

In 2012, the Secretary of Labor filed a lawsuit in the U.S. District Court for the Eastern District of Pennsylvania alleging that Progressive Business Publications and its president had violated the FLSA by failing to compensate employees subject to this policy for breaks of 20 minutes or less. In response to a motion for

summary judgment, the district court ruled that the interpretation of the FLSA given by the Department of Labor's Wage and Hour Division (WHD) was entitled to substantial deference, and established a bright-line rule which required breaks of 20 minutes or less be counted as hours worked. Progressive Business Publications appealed the entry of summary judgment to the Third Circuit.

### **The Third Circuit's Decision**

The Third Circuit rejected each of the challenges presented by Progressive Business Publications and affirmed the district court's determination that Progressive Business Publications had violated the FLSA, as well as the court's determination that the Secretary was entitled to recover liquidated damages for the violation.

Addressing Progressive Business Publications' contention that the FLSA was inapplicable to periods in excess of the 90-second carveout under the company's "flexible time" policy, the Third Circuit held that an employee's time spent logged off a computer clearly qualified as a break which was allowed under Progressive Business Publications' policies. Next, the court concluded that the WHD's interpretation of the FLSA—namely, that breaks of 20 minutes or less constituted hours worked—was entitled to substantial deference because that interpretation had remained consistent for nearly five decades, fell within WHD's expertise, and was consistent with the FLSA's purpose of protecting the well-being of employees. The Third Circuit then held that the existence of this specific regulation doomed Progressive Business Publications' argument that its policy should be evaluated pursuant to a general regulation which states that periods when employees are completely relieved from duty are not compensable. Finally, the Third Circuit rejected Progressive Business Publications' plea that the compensability of the challenged breaks should depend upon whether the breaks primarily benefitted the employer or the employee. The court emphasized that such a case-by-case analysis would be unworkable for employers and would necessitate a disruptive level of regulatory scrutiny of workplace activities.

Turning to the award of liquidated damages, the Third Circuit ruled that the district court had appropriately concluded that Progressive Business Publications had not discharged its "plain and substantial" burden to demonstrate its entitlement to relief from liquidated damages, as the company had refused to disclose the advice it had received from counsel prior to implementing the "flexible time" policy in 2009. In addition, the court held that a review of case law and the DOL's website (purportedly undertaken prior to Progressive Business Publications' adoption of the policy) would have informed the company of the existence of the DOL's bright-line interpretation that employers must compensate employees for all allowed breaks of 20 minutes or less.

### **Key Takeaways**

Although the policy of Progressive Business Publications arguably enhanced the ability of its employees to structure their workdays in ways that were more consistent with their personal needs and preferences, the Third Circuit's ruling emphasizes that this advantage cannot exist at the expense of an employee's entitlement

to be paid for periods of 20 minutes or less in accordance with the WHD's long-standing interpretation of the FLSA. Furthermore, in the wake of the DOL's recent [announcement that it will reinstate the issuance of WHD opinion letters](#), the Third Circuit's ruling provides a reminder of the factors that federal courts weigh to determine the level of deference they will give to agency interpretations of federal law. Finally, the decision reminds employers that failing to compensate employees in accordance with applicable law is not an appropriate mechanism for addressing actual or potential abuses of a policy concerning break or rest periods.

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