

Wage and Hour Defense Blog

Insight and Commentary on Wage and Hour Law Developments Affecting Employers

Ohio Enacts Changes to Overtime Exemption Laws and Class/Collective Action Procedures

By Jill K. Bigler & James (Jim) G. Petrie on April 19, 2022



Earlier this month, Governor Mike DeWine signed Senate Bill (**SB**) **47**, which formally adopted sections of the Portal-to-Portal Act (Portal Act) amendments to the federal Fair Labor Standards Act (FLSA), exempting employers from paying overtime under certain circumstances. SB 47 also eliminates so-called “hybrid” collective/class actions for Ohio plaintiffs by adopting the FLSA’s “opt-in” requirement for individuals seeking to join a wage

and hour lawsuit on Ohio state law claims for failure to pay overtime. The law takes effect on July 6, 2022.

Portal-to-Portal Act

Although Ohio federal courts have historically applied the Portal Act to Ohio state law claims, SB 47 now formally codifies the Portal Act's exclusion of certain activities from the definition of compensable "work" under the FLSA. Under the new law, an employer is not required to pay overtime wages to an employee for time spent:

- Walking, riding, or traveling to and from the actual place of performance of the principal activity or activities that the employee is employed to perform (i.e., normal commuting time);
- Performing activities that are preliminary or postliminary to the principal activity or activities; or
- Performing activities requiring insubstantial or insignificant periods of time beyond the employee's scheduled working hours (i.e., *de minimis* time).

The exclusion applies to any of the above activities when they occur before the time on any workday that the employee commences the employee's principal work activity, or after the time on any workday that the employee stops performing the employee's principal work activity.

However, the exclusion does *not* apply if the employee performs the activity:

- During the employee's regular workday or during prescribed hours;
- At the employer's specific direction;
- Pursuant to an express provision of a contract in effect at the time the employee performed the activity; or
- Pursuant to a custom or practice applicable to the activity, in effect at the time of performance, and the custom or practice is not inconsistent with a contract in effect at the time the employee performed the activity.

Opt-In Requirement

Under SB 47, an employee shall not join a lawsuit alleging a violation of Ohio’s overtime law unless the employee gives written consent to become a plaintiff and file that consent with the court in which the lawsuit is brought. This requirement that an employee “opt-in” to the lawsuit is consistent with the FLSA’s “opt-in” provisions for collective actions. Notably, SB 47 eliminates the so-called “hybrid” collective/class wage lawsuits that combine both “opt-in” plaintiffs under the FLSA and “opt-out” plaintiffs under parallel Ohio state law claims. Under the “opt-out” process, employees are automatically included in the class unless they affirmatively state in writing that they do not want to participate in the lawsuit, which can significantly increase the size of a class.

Key Takeaways

While SB 47 provides Ohio employers with consistency between state and federal overtime laws, employers should regularly review their policies and practices regarding preliminary and postliminary work activities, as well as *de minimis* time, to ensure compliance with those laws.

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