TESTIMONY BEFORE THE OHIO HOUSE COMMERCE AND LABOR COMMITTEE

IN SUPPORT OF SENATE BILL 47

BY ADAM PRIMM, BENESCH LAW, LABOR AND EMPLOYMENT PRACTICE GROUP

February 8, 2022

Chairman Stein, Vice-Chair Johnson, Ranking Member Lepore-Hagan and members of the House Commerce and Labor Committee,

My name is Adam Primm and I am a practicing labor and employment law attorney from Benesch, Friedlander, Coplan & Aronoff Law. I have been a practicing attorney in this area of the law for almost 12 years. While my practice covers a variety of labor and employment matters, I have had the opportunity to work on a number of wage and hour cases and collective or class actions under the Fair Labor Standards Act or similar state wage and hour law, including a number of wage and hour class actions involving remote employees and questions of de minimis activities performed pre- or post-shift. Thank you for the opportunity to testify today in support of Senate Bill 47.

Senate Bill 47 is important because it would provide Ohio businesses with clarity on how existing wage and hour law applies to a remote, non-exempt employee who is eligible for overtime. The standard proposed in Senate Bill 47, particularly the provision stating that employers would not be required to pay overtime compensation to employees for activities requiring insubstantial or insignificant periods of time (i.e., de minimis) beyond the employee's scheduled working hours, is not new, novel, or a change to existing law. In fact, that standard is nearly identical to the code of regulations interpreting the FLSA, specifically 29 CFR 785.47, which

cites to a number of cases between 1946 and 1955. Rather than demonstrating a change to wage and hour or overtime law, Senate Bill 47 instead codifies this preexisting and long-standing standard and offers clarity for employers attempting to pivot operationally to a post-COVID working environment where many nonexempt employees who previously working on-site with direct supervision are now permitted to work from home either part-time or full-time. Furthermore, even before COVID, improved technology allowed employees further access to digital information from home or cell phones that offered the opportunity to work outside of regularly schedules hours, while at home, after the work day ended. The increased accessibility to work materials while not physically at work creates an environment of uncertainty where employers have less control over employees' ability to engage in activities related to their employment. This uncertainty and independence offers a renewed need to provide employers guidance on when employees are engaged in work that requires compensation.

Senate Bill 47 does not reduce an employee's wages or ability to earn overtime. It merely provides a statutory standard on which employers can rely in order to determine when an employee engages in activities necessitating compensation versus a de minimis activity too insubstantial or insignificant to trigger any compensation.

FLSA precedent, including the Portal-to-Portal Act, is filled with examples of activities that are not compensable. Commuting time, while necessary for work, is not compensable work time. Time spent putting on a uniform before work or taking it off after work (donning and doffing) is similarly not compensable in most circumstances. On the other hand, drive time between job sites during a work day or time spent putting on required PPE at the job site is compensable.

Additionally, whether remote activities at an employee's home (or simply outside the workplace) is compensable is not a new concept. FLSA precedent has addressed these type of pre or post shift activities for years. Consistent with some other on-site examples discussed above, if the activity at home is a few seconds or a few minutes, it may not be compensable, while 15 minutes (or more) of activities at the end of the work day is more likely to be deemed compensable, even if outside the normal work schedule after the otherwise non-compensable commute home.

In a post-COVID world with a hybrid remote workforce with work email accessible on a personal cell phone, the likelihood of an employee checking work emails for a few seconds or minutes while otherwise relaxing at home after work is likely. It is also likely that the employee may not actually engage in any further activity other than skimming the email and leaving it for the following day. Such insignificant or insubstantial activities outside the normal work day is the epitome of de minimis activity that would not be compensable under long-standing wage and hour case law.

Senate Bill 47 does not change that in any way. Rather, Senate Bill 47 merely provides employers with a clear standard to apply when faced with a similar scenario. Instead of requiring employers to examine regulations interpreting the FLSA or case law which may or may not be overturned or relevant to the employer's own situation, a codified Senate Bill 47 provides the guidance employers need to manage the workforce consistently. It also provides employees with clarity regarding what time will be compensable or not.

Faced with improving technology and an evolving workplace, it would be better for all parties involved and Ohio in general to provide clear legislation that proactively addresses this issue and allows everyone to act accordingly rather than being forced to react to a court decision or governor's executive order.

I would like to thank Senators Brenner and Peterson for introducing this bill and to this committee for allowing me the opportunity to testify. I urge a yes vote on Senate Bill 47 and welcome any questions you may have.