Off the Clock Considerations

"On the Phone" Can Mean "On the Clock" for Employees

Thinking about texting or e-mailing your assistant with a question on her drive home from work? Then you may want to consider the wage-and-hour implications before you do. Requiring your nonexempt employees to handle work-related e-mails, texts and telephone calls without recording the time as time worked could result in lost wages, liquidated damages and attorneys' fees. If this is a practice that is done frequently and involves multiple employees, a worst-case scenario would include spending tens of thousands of dollars to defend against a class or collective action.

Consider the following examples:

- The publicly traded real estate giant CB Richard Ellis was hit with a wage-and-hour suit in March 2009. *Rulli v. CB Richard Ellis* Inc., 2:2009cv00289 (E.D. Wis., Mar. 13, 2009). John Rulli, a Wisconsin maintenance worker, claimed he and other nonexempt employees were required to use company-issued BlackBerrys after-hours in violation of the FLSA. He filed the lawsuit individually and on behalf of similarly employed CB Richard Ellis maintenance workers throughout the nation. Damages could be significant if the lawsuit is certified as a class action.
- Last summer, ABC News stripped all of its writers of company-issued BlackBerrys after three news writers declined to sign a waiver acknowledging they would not be paid for using the devices after-hours. The waiver brings up interesting questions. It is questionable whether the waivers would have held up in court because employees cannot waive their rights under the FLSA. Elizabeth Stull, *Employers Should Be Wary of Wireless Electronic Devices Usage After Hours*, The Daily Record of Rochester, July 27, 2009. The FLSA requires employers to track nonexempt workers' hours. Regardless of internal company policy, employers are required to pay nonexempt employers for the hours they work—including unauthorized overtime.
- In *Agui v. T-Mobile*, No. 1:2009cv02955 (E.D.N.Y. July 10, 2009), the plaintiffs seek to recover wages on behalf of themselves and other retail sales associates and supervisors for time worked "for which they received no compensation at all." Specifically, they allege that they "were required to review and respond to T-Mobile e-mails and text messages at all hours of the day, whether or not they were punched in to T-Mobile's computer-based timecard system." The case is brought as a putative collective action against T-Mobile and its management, identified as "John Does #1-10," pursuant to the provision of the FLSA that permits liability against individuals and is also being brought against T-Mobile as a putative class action pursuant to the California Wage Law for the California class. If a class is certified by the court, putative plaintiffs will not have to affirmatively opt in to the lawsuit under the California Wage Law. Those putative plaintiffs who do opt in, pursuant to the procedure under the FLSA, can hold the individual managers jointly and severally liable for damages.

These case examples illustrate the most recent trend for wage-and-hour claims being brought under the Fair Labor Standard Act ("FLSA"). When these claims are brought as a class or collective action, they can result in massive awards and settlements that can cripple an employer.

It is clear that employers should be wary of allowing nonexempt employees to perform work on wireless electronic devices after-hours. However, texting, e-mailing or calling workers during their breaks or after their scheduled work hours are not the only practices that invite an off-the-clock wage claim from employees. Generally, as long as the employer has actual or constructive knowledge that work is being performed, and the work performed is "to the benefit of the employer," the time will be compensable as hours worked.

An off-the-clock claim can be avoided where the employee is properly classified as exempt from the FLSA. To be clear, if an employee is FLSA-exempt, the overtime laws do not apply to that person. However, employers cannot dodge this issue by simply reclassifying workers as FLSA-exempt. An employee is not exempt unless she or he falls into one of several identified exemptions under the DOL regulations, including executive, administrative, professional, computer professional, and highly compensated exemptions. Each exemption must satisfy several highly technical tests and generally most tradespersons, office workers, and other employees will be considered nonexempt and thus candidates for compensation when they work off the clock.

Be Wary of Off-the-Clock Exceptions: De Minimis Time and Rounding

The Golden Rule of the FLSA is that when you cannot find an exemption, look for an exception. Many off-the-clock claims arise from an employer misclassifying an employee as exempt. When it comes to off-the-clock claims, two common exceptions employers often use to justify nonpayment include *de minimis* time and rounding. The problem is these FLSA exceptions are often lengthier and more complex than the rule itself. These two exceptions, if used incorrectly, can and often do lead to lawsuits. Employers must be aware of when and how they should be used and avoid using them as a tactic for not paying employees for actual time worked.

De Minimis Time

The Supreme Court of the United States determined that any *de minimis* time worked beyond an employee's scheduled time can be disregarded for purposes of compensating that employee. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 692 (1946). Since then, the courts and the Department of Labor ("DOL") have struggled to properly instruct employers how to apply the de minimis doctrine.

The DOL has stated that when there are uncertain and indefinite periods of time of a few seconds' or minutes' duration, that are beyond the scheduled work hours, the time may be disregarded as *de minimis*. However, courts still struggle to determine what is *de minimis*. Currently, all courts are not applying the *de minimis* exception uniformly. In *Carlsen v. United States*, 521 F.3d 1371 (Fed. Cir. 2008), the court suggested that 10 minutes is regarded as a cutoff; anything under can generally properly be considered *de minimis*—while anything over cannot. However, the Ninth Circuit has explicitly rejected the idea that the amount of time alone determines whether an activity is *de minimis*.

In *Rutti v. LoJack Corp*., 578 F.3d 1084 (9th Cir. 2009), Mike Rutti brought a class-action lawsuit on behalf of all technicians hired by LoJack to install car alarms. One aspect of the lawsuit was that Rutti sought compensation for activities performed at the technician's homes, after the technician had already left work. LoJack argued, among other things, that the technicians spent minimal time performing these activities and thus the technicians need not be compensated for that amount of time spent working after-hours.

The Ninth Circuit had previously adopted the *de minimis* rule, stating "[w]hen the matter in issue concerns only a few seconds or minutes of work beyond the scheduled working hours, such trifles may be disregarded." *Lindow v. United States*, 738 F.2d 1057, 1062 (9th Cir. 1984) (quoting *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 692 (1946)). In *Lindow*, the court held that seven to eight minutes was *de minimis*. However, the Ninth Circuit refused to apply a standard amount of time that would automatically qualify as *de minimis*. Instead, the courts set forth a three-prong factor test that could be used to determine whether time was *de minimis*. These three factors were "(1) the practical administrative difficulty of recording the additional time; (2) the aggregate amount of compensable time; and (3) the regularity of the additional work." *Id*. at 1063. The case was remanded back to the district court for the district court to determine whether the activities performed after work were *de minimis*.

Rounding

The second exception, called rounding, is also found in a DOL regulation. The regulation, 29 C.F.R. 785.48(b), covers the practice of rounding and states that computing work time by recording the employees' starting and stopping time to the nearest quarter of an hour will be accepted, so long as it is used in a manner that will not, over a period of time, fail "to compensate the employees properly for all the time they have actually worked." This last phrase has been understood by courts to mean that the rounding must average out—it cannot always occur in favor of the employer. Over time, the system must even out to be fair to the employee. Rounding

after seven minutes has been deemed, by most courts, unfair to the employees and can result in back wages being owed.

These two exceptions, rounding and de minimis time, are highly litigated. Employers should not use either of these practices without fully understanding them. Additionally, employers should be knowledgeable of the rules as they are applied in their jurisdiction.

Practical Advice for Avoiding Off-the-Clock Claims

Employers must take the necessary precautions to comply with the FLSA

Knowing what the FLSA and its regulations say is not enough. Employers should be mindful of the pitfalls created by a digital workforce and take the appropriate precautions. *Wage and Hour Issues in the BlackBerry Era*, Carrie B. Rosen, **www.mondaq.com**, May 30, 2009. Policies should be reviewed and consideration should be given to preventing nonexempt employees from checking or responding to e-mail or performing other work-related tasks outside of normal working hours or without express authorization. However, this may be difficult to enforce; BlackBerrys are called “CrackBerrys” for a reason.

In addition, employers should ensure the policies explicitly state that employees must report all working time spent on portable electronic devices and that failure to do so can result in discipline. For example, employees should be informed that they must report all time spent reviewing and/or responding to e-mails outside of normal working hours in order to ensure they are properly compensated for all working time. *Id.*

Employers must follow-through

Creating and reviewing policies will be in vain if the employer does not enforce them. If the policy states that an employee cannot work without express authorization, the employer should also have a procedure for enforcing that policy. When the policy is violated, the procedure should be implemented. Regardless of whether overtime was worked in violation of company policy, however, that employee must be compensated for the work done.

One extremely talented employment defense attorney has remarked that she does not know why her plaintiff attorney friends still mess around with run-of-the-mill discrimination lawsuits. The recent amendments to the FLSA, and the regulations interpreting them, are so complicated that the majority of employers are not in compliance. Compared with the requirements for establishing liability under Title VII and its progeny, it is as though employers are strictly liable for FLSA violations.

Employers without policies regulating performing work on electronic gadgets after-hours should establish them. One of the best investments an employer can make is to consult its attorney before implementing any new human resources policy. The $64,000 question is whether or not the employees in question are exempt or nonexempt. Your attorneys at Kutak Rock stand ready, willing and able to assist with this as well as any other employment issues you may have. We are only a phone call, a text message or an e-mail away (even after regular business hours).

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