The Start of Something Big?
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A police officer has sued the City of Chicago (on behalf of himself and others) seeking pay for time spent dealing with work-related phone calls, voice-mails, e-mails, text messages, and work orders via BlackBerry® devices and similar "personal digital assistants." The officer contends that these activities entitle the group to an award of overtime compensation under the federal Fair Labor Standards Act (FLSA).

The potential for these claims has been lurking for awhile now, and the relevant FLSA principles are not new. What has changed is this: the explosion of 24/7 electronic communication has increased the frequency and expanded the circumstances, in which non-exempt employees perform after-hours and off-premises work. Join this with the strict requirements of a 70-year-old law that was designed for a bygone era, and you have the recipe for a lawsuit extravaganza.

Little Things Add Up

The question is not whether these activities are compensable FLSA "hours worked" for a non-exempt employee – they *are*. But conventional wisdom leads some to think that things like writing a text message or listening to a voice-mail involve too little time to worry about. The truth is that this so-called "*de minimis*" concept is perilously vague, ill-defined, and unpredictable under the FLSA. No particular timeframe is necessarily small enough to be reliably considered *de minimis*, and in any event the per-occurrence amount of time is not all that the courts take into account. Other considerations can include such things as:

- the aggregate amount of an individual's time spent in these activities;
- the aggregate amount of time spent by all of the individuals making claims;
- the regularity of the activities;
- whether and to what extent capturing the time creates a substantial administrative burden and practical difficulty; and
- properly balancing FLSA policy favoring paying employees for even small amounts of time against the increased burden and difficulty of doing this.

Instead of hoping for a *de minimis* finding, the safer (and legally-preferable) approach is to require your non-exempt employees to keep accurate records of the time spent working. This might be done, for example, on a special form designed for this purpose. The employees then submit this record so that the activities can be counted along with their other work in order to compute wages. Alternatively, cases and U.S. Labor Department interpretations dealing with analogous situations might arguably support developing a reasonable estimate of how long these activities take each day. An employer would then reach an agreement or understanding with employees in advance as to how much time it will add to their hours worked to account for handling these duties. Even so, it remains to be seen how the courts will react to this approach, and basing pay upon anything other than the actual facts always increases uncertainty.