

A Perfect Storm

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Advance planning and clear policies will minimize the risk of overtime claims by an increasingly connected workforce.

Smartphones and the Fair Labor Standards Act

The nine-to-five workday is quickly becoming a relic of the past. Due in large part to the exploding popularity of smartphones, today's work environment extends beyond the office to the car, the home and anywhere within the

reach of a wireless signal. Smartphone models such as BlackBerry, iPhone and Android allow users to surf the Internet, send and receive e-mail and store data. Analysts predict that more Americans will use smartphones than traditional cell phones by the end of 2011. Roger Entner, *Smartphones to Overtake Feature Phones in U.S. by 2011* (Mar. 26, 2010), <http://blog.nielsen.com/nielsenwire/consumer/smartphones-to-overtake-feature-phones-in-u-s-by-2011/>. With pressure mounting to improve productivity in the current economic environment, employees are increasingly expected to use smartphone technology to stay connected to their jobs on nights, weekends and even vacations. One study found that BlackBerry users lose on average one hour of leisure time to work every day. Andy McCue, *Users Try to Keep the 'Berry in Balance*, USA Today (July 19, 2007), http://www.usatoday.com/tech/products/cnet/2007-07-19-blackberry-in-balance_N.htm. All this con-

nectivity has produced a predictable side effect—employees want compensation for their electronic overtime.

Fair Labor Standards Act (FLSA) claims continue to gain popularity among employees and their attorneys. Enacted in 1938, the FLSA requires employers to pay covered employees who are not otherwise exempt at least the federal minimum wage and overtime pay of 1.5 times regular pay for each workweek. 29 U.S.C. §207(a). Even work that an employer does not request is compensable if the employer has actual or constructive knowledge of it. *Schneider v. Landvest Corp.*, 2006 WL 322590 (D. Col. Feb. 9, 2006) (“an employer is obligated to pay an employee for all hours worked, even those in addition to his or her prescribed schedule, if the employer knows or has reason to know that the employee is working additional hours”); see also 29 C.F.R. §785.11 (“work not requested but suffered or permitted is work time”). More-



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over, employees may not relinquish FLSA rights by contract. *McBurnie v. City of Prescott*, 2010 WL 5344927 (D. Ariz. Dec. 22, 2010) (“An individual may not relinquish rights under the Act, even by private agreement between the employer and employee, because this would nullify the purposes of the statute and thwart the legislative policies it was designed to effectu-

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ate.”). Employees who prevail in litigation can recover back wages plus interest, liquidated damages, attorneys’ fees and costs. 29 U.S.C. §216(b). Significantly, the FLSA also allows class actions, known under the FLSA as “collective actions.” *Id.*

The number of FLSA cases filed in federal district courts nationwide rose from 5,210 in 2008 to 6,118 in 2009. Anthony R. McClure, *Number of New FLSA Lawsuits Filed Each Year Continues to Rise*, Litigation News (Oct. 14, 2010), http://apps.americanbar.org/litigation/litigationnews/top_stories/101410-rise-in-flsa-employment-and-labor.html. Between January 1 and September 30, 2010, over 5,300 FLSA cases were filed—a more than 13 percent increase over the same period in 2009. *Id.*

While the rising tide of FLSA litigation does not yet include a significant number of electronic overtime claims, the flood appears to be coming. Top tier companies such as Verizon, T-Mobile and Black & Decker already have been sued for unpaid overtime related to smartphone use. In one high-profile FLSA lawsuit, a police sergeant sued the City of Chicago. This is likely only the beginning. The combination of recessionary market forces, increased demand for worker productivity, the wired American workforce and ready access to collec-

tive actions under the FLSA has conspired to create a perfect storm that will disturb employers. In the current environment, the onslaught of electronic overtime claims is perhaps only a matter of time. A prudent employer would do well to address the issue before the storm hits.

FLSA Exemptions

The first question in determining if off-duty smartphone use is compensable is whether an employee is exempt from FLSA protection. At first, mobile devices were widely issued to executives, managers and other employees who would be deemed “exempt” under the FLSA. However, with the proliferation of mobile communication, more “nonexempt” employees working for hourly wages have been expected to use mobile devices after hours for work-related tasks.

Importantly, employee job titles will not determine whether an employee is exempt under the FLSA, nor will receiving a salary rather than an hourly wage. 29 C.F.R. §541.2. By some accounts, as many as half of U.S. corporations *incorrectly* classify their employees as exempt from FLSA overtime requirements. Michelle Conlin, *Revenge of the “Managers”: Many So-Called Supervisors Are Suing for Overtime Pay*, Bus. Wk., Mar. 12, 2001, at 61. Consequently, employees who are called “managers” or “executives” may, in fact, be neither.

Rather, determining an employee’s exempt or nonexempt status under the FLSA requires examining his or her salary and duties. While several exemptions exist under the statute, the most common are the so-called “white-collar” exemptions. Specifically, the FLSA’s overtime requirements do not apply to workers “employed in a bona fide executive, administrative, or professional capacity.” 29 U.S.C. §213(a)(1). Employees qualify for these exemptions if they earn a salary of at least \$23,660 annually and perform requisite duties as established by U.S. Department of Labor (DOL) regulations. *Johnson v. Big Lots Stores, Inc.*, 561 F. Supp. 2d 567 (E.D. La. 2008); *see also* 29 C.F.R. §541.100(a).

An employee satisfies the executive exemption if (1) his or her primary duty is to manage an enterprise or an enterprise’s subdivision, (2) he or she “customarily and regularly directs the work of two or more other employees,” and (3) he or she has the au-

thority to hire or fire employees or substantially influence the decision to take those actions. 29 C.F.R. §§100(a)(2), (3) & (4).

To qualify for the professional exemption, an employee’s primary duty must require either (1) advanced knowledge acquired by the prolonged course of specialized instruction, or (2) “invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.” 29 C.F.R. §§541.300(2)(i) & (ii).

Finally, an employee satisfies the administrative exemption if his or her primary duty involves (1) office or non-manual work that is directly related to the management or general business operation of the employer, and (2) “the exercise of discretion and independent judgment with respect to matters of significance.” 29 C.F.R. §§541.200(a)(2) & (3).

An employer need not pay employees who satisfy any of the white-collar exemptions for their overtime, electronic or otherwise.

What Constitutes Work Under the FLSA?

Assuming that an employee is not considered exempt under the FLSA, the next question is whether after-hours smartphone use constitutes work. While the FLSA does not specifically define “work,” the Supreme Court has defined it as “physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily for the benefit of the employer and his business.” *Tenn. Coal, Iron R.R. v. Muscoda Local No. 123*, 321 U.S. 501, 598 (1944). The Court later extended the definition to off-duty work if it is an “integral and indispensable part of the [employee’s] activities.” *Steiner v. Mitchell*, 350 U.S. 247, 256 (1956). Concerned that this broad definition of work could unduly burden employers, the courts and Congress have provided limitations on the FLSA’s reach.

De Minimis Doctrine

The Supreme Court recognized the de minimis doctrine to treat negligible amounts of work as non-compensable under the FLSA. *Anderson v. Mt. Clemens Potter Co.*, 328 U.S. 680, 692 (1946). Courts consider three factors in determining whether work is de minimis: “(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.” *Lindow v. United States*, 738 F.2d 1057, 1062 (9th Cir. 1984). While no bright-line rule exists, work taking less than 10 minutes is generally considered de minimis. *Id.* To avoid this exception, FLSA plaintiffs will seek to aggregate their e-mails, text messages and other communications with a company, which individually might be considered de minimis, but collectively could be significant.

Portal-to-Portal Act

In response to case law that increased exposure of companies to unexpected liabilities, Congress amended the FLSA in 1947 to include the Portal-to-Portal Act. The act made non-compensable time spent traveling to or from work or performing activities that are preliminary or “postliminary” to work. 29 U.S.C. §254(a). However, activities performed before or after work that are integral and indispensable to the job, such as showering and changing clothes after handling hazardous materials, are not excluded by the Portal-to-Portal Act. *Steiner*, 350 U.S. at 251–53.

On-Call Time

According to DOL regulations, time spent “at home on call may or may not be compensable depending on whether the restrictions placed on the employee preclude using the time for personal pursuits.” 29 C.F.R. §553.221(d). Further, “where the conditions placed on the employee’s activities are so restrictive that the employee cannot use the time effectively for personal pursuits, such time spent on call is compensable.” *Id.*

Beware of State Laws

The vast majority of states have enacted overtime legislation. While many of the state statutes simply mirror the FLSA, others differ significantly. See Marc Lindner, *Time and a Half’s the American Way: A History of the Exclusion of White-Collar Workers from Overtime Regulation, 1868–2004*, at 1204–08 (2004) (summarizing wage and hour law of each state). If a state law extends greater protection to an employee than federal law, the state law will apply. 29 U.S.C. §218(a). As a result, employees who are not entitled to overtime compensation under the

FLSA still may be entitled to overtime compensation under state laws. Accordingly, an attempt to develop policies and procedures to ensure wage and hour compliance should include an analysis of state laws.

Smartphone and Remote Log-In Cases

Employees have pursued a handful of lawsuits involving off-the-clock use of smartphones. Many of them are still pending. A representative sample follows.

In *Rutti v. LoJack Corp. Inc.*, 596 F.3d 1046 (9th Cir. 2010), LoJack technicians attempted to pursue a FLSA collective action. Among the uncompensated off-the-clock activities complained of was time spent logging on to a portable data terminal (PDT) both at the start and close of the day. The PDT provided work assignments at the beginning of the day. At the close of the day, technicians uploaded the results of their work through the PDT. The activity typically took less than 10 minutes per day; however, frequent upload failures required the technicians to repeat the activity.

The California District Court initially granted summary judgment for the defendant based, in part, on the de minimis doctrine. On appeal, the Ninth Circuit reversed in part, finding material fact issues regarding whether the “postliminary” data transmissions were compensable due to the reports of frequent transmission errors. The case was remanded to the Central District of California. On remand, the district court denied the named plaintiff’s motion for conditional class certification. The court found that the putative class members variously used the PDTs rendering them dissimilarly situated.

West v. Verizon Communications, Inc., 2009 WL 2957963 (M.D. Fla. Sept. 10, 2009), is an attempted FLSA collective action of a former Verizon personal account manager (PAM) alleging that the company failed to pay overtime even though she was required to be on-call from 9 a.m. to 9 p.m., Monday through Saturday. Each PAM worked from home, and the company issued each a BlackBerry with e-mail and text-messaging capabilities. Denying class certification, the district court found that the BlackBerry gave each PAM the flexibility to conduct his or her required calls and e-mails while engaging in activities both inside and outside the home. This supported Verizon’s

position that the court could not deem the account managers similarly situated for purposes of a collective action. Verizon has a partial summary judgment motion pending before the district court.

In *Agui v. T-Mobile USA Inc.*, (E.D.N.Y. July 10, 2009), former T-Mobile sales representatives claimed, among other things, that the company provided BlackBerrys or

Some employees

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other smart devices to them and required them to respond to work-related e-mails and text messages at all hours. They claimed to be on their smartphones for 10–15 hours per week. The case settled in May 2010 before the filing of any dispositive motions.

Rulli v. C.B. Richard Ellis Group, Inc., Case No. 2:09-CV-00289 (E.D. Wis. Mar. 13, 2009), is an attempted FLSA collective action in which an hourly maintenance employee claimed that he was not fairly compensated for time that he spent on a company-issued personal digital assistant (PDA). He alleged that he was required to use his PDA outside his normal work hours in violation of the FLSA. On January 11, 2010, the court granted the employee’s motion to conditionally certify a class of similarly situated employees. The case is pending.

Kuebel v. Black & Decker (U.S.) Inc., 2009 WL 1401694 (W.D.N.Y. May 18, 2009), involves an overtime dispute alleging that Black & Decker policy on employee commutes to and from work in conjunction with the time employees spent at home before and after work syncing their company-provided PDAs and responding



to e-mail violated the FLSA. The Western District of New York granted partial summary judgment for the employer, finding that using the PDAs at home did not contribute to the employees' principal activity of maintaining product displays in their stores. The case is currently on appeal.

Allen v. City of Chicago, Case No. 1:10-CV-03183 (N.D. Ill. May 24, 2010), involves a sergeant for the Chicago Police Department who sued the City of Chicago for unpaid overtime related to off-the-clock PDA use. The police department issued police officers PDAs and required them to respond to work related e-mails, text messages and voicemails around the clock while off duty. Allen alleged that he was expected to immediately respond to all work-related communications during off-the-clock hours without compensation to which he was entitled under the FLSA. The district court recently denied the city's motion to dismiss, apparently, in part, because the city mostly argued that the police collective bargaining agreement necessitated resolving Allen's claim through its "grievance and arbitration process." 2011 WL 941383, at *3 (N.D. Ill. Mar. 15, 2011). Although the court did "wonder about the ability to treat on a class basis the broad range of situations in which police personnel may "respond" to messages that are sent to them on PDAs, the extent to which those responses might constitute "work, and the extent to which any work might not be compensable because it is 'de minimis.'" *Id.* at *5.

As even *Allen v. City of Chicago* may eventually demonstrate, one common and effective defense strategy has emerged from these cases, all of which plaintiffs have attempted to pursue as collective actions under 29 U.S.C. §216(b). Defendants have successfully defeated the similarly situated requirement due to the varied extent of PDA use among putative class members. While some employees check their smartphones constantly, others use them infrequently. In light of the FLSA's de minimis exception, which would likely not compensate the infrequent user, these varied usage levels have prompted several courts to find that collective action treatment is unwarranted.

Practical Suggestions When Counseling Employers

Even winning in court is still a loss to the bottom line. Staying out of court in the first

place is the gold standard. Counsel can help clients accomplish this through a reasoned and proactive approach to dealing with employees who work via remote access. Practical suggestions follow.

Define Company Objectives

Does an employer want its nonexempt employees to have remote access, via smartphone or otherwise, to the company's e-mail and computing systems? Is a company willing to pay overtime for remote access? Is a company prepared to deal with data security issues that may result from electronically transmitting information? What about vicarious liability for automobile accidents involving employees talking or texting on company-issued smartphones? A company should define its objectives with respect to remote access and employee overtime and develop policies that best meet its goals.

Prohibit Work by Remote Access

If an employer is unwilling to pay its nonexempt employees for work via remote access, then in most cases it should not issue smartphones to them. An employer also can go further and prohibit nonexempt employees from working by remote access altogether. Specifically, a company's IT department can limit remote access to its systems only to employees who are exempt from wage and hour laws. However, precluding nonexempt employees from remote access is not foolproof because they can still communicate about work with supervisors using private e-mail, text messages or cell phones. Nevertheless, a policy that prohibits offsite work would go a long way in defeating an overtime claim based on these modes of communication.

Allow Work by Remote Access

If an employer is willing to pay its nonexempt employees for work via remote access, it should establish policies regarding that work. For example, a company can require that an employee obtain prior written approval from a supervisor before engaging in offsite work. A company should require that an employee record all such work and immediately report it. On a related note, if a company allows remote access, it should establish policies regarding data security. If a company provides cell phones to its employees, the company should prohibit

employees from using their smartphones while driving.

Ensure That Employees Are Properly Classified

Even the best remote access policy will fail if a company improperly classifies employees as exempt. The costs associated with an overtime claim of a misclassified employee who works around the clock via remote access could be staggering. The first order of business, therefore, is to ensure that a company correctly classifies employees. When in doubt, an audit of an employee's compensation and job duties relative to wage and hour laws is in order.

Put It in Writing

Whatever a company decides regarding remote access, the company should put it in writing and require employees to sign acknowledgments of the company policy. While a written policy will not eliminate overtime claims, it will help in defending them when they do arise.

Conduct Training

Even the most carefully drafted policies will be all but useless if employee training does not cover them. A company must educate exempt and nonexempt personnel alike on the company's remote access policy to achieve its desired results. Exempt employees typically are the ones who reach out to nonexempt employees for after-hours assistance. Both need to understand a company's rules for making and responding to those requests. Periodic training is critical for the success of a company's remote access objectives.

Conclusion

With the exploding popularity of smartphones and the after-hours access that they afford to employees to perform work, it is perhaps only a matter of time before FLSA collective actions involving smartphone use become commonplace. A proactive employer would do well to assess the risk now, evaluate company objectives concerning employees working via remote access and adopt written policy and training protocols to effectuate the company's goals. Advance planning and clear policies will minimize the risk of overtime claims by an increasingly connected workforce. 