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After-Hours Use of Electronic Devices: Avoiding and Defending Overtime Pay Claims

Defining Working Time, Leveraging Defense Tactics, Defeating Class Certification, Proactively Avoiding Claims

TUESDAY, JANUARY 8, 2019

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

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After-Hours Use of Electronic Devices

Introduction and the Legal Landscape

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Goals for Today's Webinar

- Overview of today's technologies and their impact on "hours worked"
- Review of the legal landscape – FLSA and the recent cases shaping courts' analysis of after-hours use of electronic devices
- Discuss defenses to electronic overtime pay claims, including for defeating class action certification
- Provide policy drafting tips and best practices to help avoid claims of electronic overtime pay

What 2018 Looked Like 50 Years Ago

- In 1968, leading scientists of the time released a report about what, among other things, technology would look like in 50 years. They predicted:
  - Miniature computers – "very small, portable storage units"
  - "Tax returns, social security records, census forms, military records, perhaps a criminal record, hospital records, security clearance files, school transcripts … bank statements, credit ratings, job records" and more, in 50 years, would be stored on computers that could communicate with one another over a vast international network – you could find out anything about anyone, without ever leaving your desk
- "Machines will do more of man's work, but will force man to think more logically."

Jill Lepore, *What 2018 Looked Like Fifty Years Ago*, The New Yorker

BYOD Is the New Normal

- Dual-use devices are ubiquitous among employees
  - Recent surveys indicate that most of the smartphones used for work are employee-owned
  - “Bring Your Own Device” or “BYOD”
  - Recent surveys/statistics reflect that most employers:
    - Do allow employees to BYOD
    - Do not have dedicated written policies for BYOD that include express parameters for after-hours use of these devices

Employees use their electronic devices…

- To do pretty much everything, including to:
  - Respond to, and to make work-related calls
  - Send work e-mails
  - Exchange texts, including with co-workers and with supervisors
  - Access and work in their employers' systems
- Unlike the office, which may have standard working hours, employees' electronic devices are with them and fully on and functioning 24/7

What's the FLSA Got to Do With It?

- Fair Labor Standards Act (FLSA)
  - Enacted in 1938… or
    - 50 years before the "World Wide Web"
    - 60 years before founding of Google and
    - 70 years before the release of the first IPhone
  - Widely criticized as out-of-touch with the times
  - At its core, the FLSA requires that "non-exempt employees," i.e., individuals whose work tasks generally are non-supervisory in nature and do not entail sufficient discretion, must be paid for all "hours worked," including any overtime hours. This requires:
    1. Proper, compliant classification of non-exempt employees
    2. Accurate tracking of and payment for all time worked

Review of the FLSA/Overtime Basics

- Overtime pay at the rate of one-and-a-half where an individual is “employed” in excess of 40 hours in a given work week
  - Note: Additional/different rules apply in many states, e.g., CA
- “Employed” is broadly defined as “to suffer or permit to work”
- Employers cannot “sit back and accept” work without paying for it. They must pay for work they know about, even if they:
  - Did not ask for the work
  - Did not want the work done, and even
  - Had a rule against doing the work
- If an employer does not want to pay overtime, management must exercise control and see that the work is not performed

Review of the FLSA/Overtime Basics

- Only exception to compensation: work an employer did not know about, and had no reason to know about
- Knowledge can be actual or constructive, where employer should have known through *reasonable diligence*
  - One way to establish "reasonable diligence" is to have a policy and process in place for employees to report uncompensated time
- Even if an employer has a good policy and practice, it's not worth the paper it's written on if management does not enforce it – or, worse, if management explicitly or implicitly prevents or discourages accurate reporting

FLSA Violations and their Costs

- A landmark 2009 study of 4,000 workers in many low wage industries in Chicago, Los Angeles, and New York City found that 76% of workers were not paid overtime, 26% were paid under the minimum wage, and 22% of workers said they worked before and after their shifts without getting paid for the work
- A more recent 2017 Economic Policy Institute report concluded that 2.4 million workers in ten most populous states lose $8 billion annually to “wage theft,” including overtime violations
- In 2018, the Department of Labor (DOL) recovered a record-setting $304 million in back wages for alleged FLSA violations – total for past 5 years is $1.3 billion

Recent Headlines of FLSA Settlements

- *Energy Firm, Workers Closer to $4.2M Overtime Pay Settlement*: 27 employees accused energy firm of not paying them overtime for mandatory pre-shift work. On December 28, 2018, settlement received judge's preliminary approval. *Luebke v. Wis. Electric Power Co*., No. 17-CV-969, E.D. Wis.

- *California Car Washes to Pay $4.2M to Settle Wage, Overtime Suit*: In a case brought by the DOL, more than 800 workers alleged that a company operating 12 car washes in Southern California failed to accurately track and pay them for overtime hours worked. *Acosta v. Sw. Fuel Mgmt, Inc*., No. 2:16-cv-04547, C.D. Cal.

- *Frito Lay Drivers' $6.5M Wage Settlement Approved*: 254-member collective action stretching back to 2015 alleged that the company failed to pay them for work in addition to their driving duties. *Acosta v. Frito-Lay, Inc*., No. 15-cv-02128-JSC, N.D. Cal.

FLSA Litigation Trends

- Wage and hour lawsuits under FLSA is the hot area for plaintiffs' attorneys
  - The number of wage cases filed is growing faster than traditional employment lawsuits
  - The cases often turn on the plaintiffs' own testimony, with little evidence available to employers to rebut exaggerated claims
  - One misstep by employers in classification of employees and/or structuring of payment policies can give rise to a class action lawsuit
  - Damages add up quickly, and tend to include sizeable legal fee awards

First Things First: Misclassification Matters

- No. 1 mistake is misclassification of truly non-exempt employees as exempt
- No. 2 mistake, which compounds the No. 1 mistake, is not keeping accurate track of those employees' hours worked
  - Employers are then liable to compensate for all FLSA overtime hours worked up to the last 3 years
  - Without adequate records, the employer may not rebut any reasonable inference that the employee(s) make(s) regarding hours worked, and if found in violation of the FLSA, may have to compensate for them all

29 CFR 541.0

a) Section 13(a)(1) of the Fair Labor Standards Act, as amended, provides an exemption from the Act's minimum wage and overtime requirements for any employee employed in a bona fide executive, administrative, or professional capacity, or in the capacity of an outside sales employee
b) Section 13(a)(17) of the Act provides an exemption from the minimum wage and overtime requirements for computer systems analysts, computer programmers, software engineers, and other similarly skilled computer employees
c) The requirements for these exemptions are contained in this part as follows: executive employees, subpart B; administrative employees, subpart C; professional employees, subpart D; computer employees, subpart E; outside sales employees, subpart F
d) Subpart G contains regulations regarding salary requirements applicable to most of the exemptions, including salary levels and the salary basis test. Subpart G also contains a provision for exempting certain highly compensated employees. Subpart H contains definitions and other miscellaneous provisions applicable to all or several of the exemptions

29 CFR 541.2

- A job title alone is insufficient to establish the exempt status of an employee
- The exempt or nonexempt status must be determined on the basis of whether the employee's salary and duties meet the requirements of the regulations in this part

29 CFR 541.3(a): Scope of Exemptions

- The section 13(a)(1) exemptions and the regulations in this part do not apply to manual laborers or other “blue collar” workers who perform work involving repetitive operations with their hands, physical skill and energy
- Such nonexempt “blue collar” employees gain the skills and knowledge required for performance of their routine manual and physical work through apprenticeships and on-the-job training, not through the prolonged course of specialized intellectual instruction required for exempt learned professional employees such as medical doctors, architects and archeologists
- Non-management production-line employees and non-management employees in maintenance, construction and similar occupations such as carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremen, construction workers and laborers generally are entitled to minimum wage and overtime

The Three Major Exemptions

- The FLSA provides an exemption for executive, administrative and professional employees
- Broadly speaking, whether an employee is exempt depends on the employee's salary and job duties

Salary Considerations

- $455/week or $23,660 year
  - Under Obama DOL rules issued May 18, 2016, the minimum salary was set to go up to $47,476 per year
  - The new rule was enjoined by a federal district court in Texas
  - DOL Secretary Alexander Acosta stated he plans to increase the current salary threshold (no hint as to what it will be, but it likely will be above $23,660 and below $47,476)
- If an employee in question earns less than the current salary level, the employee is “non-exempt” from overtime

Job Duties: Executive Exemption

- Whose primary duty consists of the management of the enterprise in which he is employed or of a customarily recognized department or subdivision
- Who customarily and regularly directs the work of two or more other employees
- Who has the authority to hire or fire employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight

Job Duties: Administrative Exemption

- Whose primary duty consists of the performance of office or non-manual work directly related to management policies or general business operations of his employer or his employer's customers, AND
- Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance

Job Duties: Professional Exemption

- Whose primary duty consists of the performance of work requiring knowledge of an advanced type (defined as work which is predominantly intellectual in character, and which includes work requiring the consistent exercise of discretion and judgment) in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instructions; OR
- Whose primary duty is the performance of work requiring invention, imagination or “talent” in a recognized field of artistic or creative endeavor
- Examples include lawyers, teachers, accountants, pharmacists, engineers, actuaries, chefs, registered nurses (but not LPNs)

Other Exemptions

- Outside sales employees whose primary duty is making sales or obtaining orders or contracts for services or for the use of facilities, and who are regularly engaged away from the employer's place or places of business
- Motor Carrier Act exemption for employees who are within the statutory authority of the Secretary of Transportation (to establish qualifications and maximum hours of services pursuant to the Motor Carrier Act)
- Farm workers employed on small farms, and certain seasonal and recreational establishments' workers
- More discreet exemptions include aircraft salespeople, airline employees, taxicab drivers, newspaper delivery persons, radio station employees, country elevator workers, forestry employees of small firms, seamen on American vessels, switchboard operators, youth employed as actors or performers, youth employed by their parents, livestock auction workers

Determining “Hours Worked”

- Time “suffered or permitted” to work includes work not requested by the employer, but performed by the employee – e.g.:
  - Responding to late night e-mails from the supervisors
  - Texting with co-workers or supervisors
  - Answering work-related phone calls

De Minimus Rule

- An employer can disregard insubstantial or insignificant amounts of time beyond a worker's scheduled hours if it cannot "as a practical matter" precisely record the time
- This rule only applies when there are a few minutes, or seconds, of uncertain and indefinite time periods involved
- An employer cannot arbitrarily fail to count time worked of the employee's fixed or regular working time

FLSA Record-Keeping Requirements

- FLSA-covered employers must keep certain records relating to employees' hours worked and wages paid
- These records must include:
  - Employee's occupation, day and time of week when workweek begins
  - Total hours worked each workweek
  - Basis on which wages are paid (e.g., $8/hr., $500/week, piecework)
  - Regular hourly pay rate
  - Total straight time and overtime earnings each workweek
  - All additions to or deductions from wages
  - Date and amount of each payment
  - Pay period covered by each payment

FLSA's Record Retention Requirements

- Typical records that must be kept for 3 years:
  - Payroll records
  - Collective bargaining agreements
  - Sales and purchase records
- Typical records that must be kept for 2 years:
  - Records on which wage computations are based, including time cards, piece work tickets and work/time schedules
- Records must be made available to the DOL on demand

FLSA Statutes of Limitations

- Civil actions for “non-willful” violations carry a 2-year SOL
  - employers are liable for all non-willful violations within the past two years
- Civil actions for “willful” violations carry a 3-year SOL
  - “willful” violations are made if the employer either knew his conduct violated the Act, or showed reckless disregard for whether his actions complied with the Act
- Criminal actions have a 5-year statute of limitations

Damages and Defense Issues

- Damages include unpaid wages/overtime for the applicable 2 or 3-year period prior to the filing of the complaint, interest, liquidated damages and legal fees
- While individual amounts may seem small, damages grow exponentially, particularly in the class action context
- Criminal sanctions also may apply
- Problems for the defense include lack of documentation, competing testimony and the typically high attorneys' fees, particularly in the class action context

Epic and Class Action Waivers

- In *Epic Systems Corp. v. Lewis*, No. 16-285 (May 21, 2018), the U.S. Supreme Court ruled that arbitration agreements which bar the pursuit of class-wide actions do not violate the National Labor Relations Act
- If an employer has a valid arbitration policy – in employment agreements, a handbook, or elsewhere – it may wish to compel arbitration on an individual basis
  - While *Epic* is widely viewed as a win for employers, plaintiffs' counsel keep warning us: "Be careful what you wish for!"

Recent Litigation Re: Electronic Devices

- *Allen v. City of Chicago*, No. 16-1029, 7th Cir. 2017
  - Seminal case on the issue
  - Chicago police officers alleged they did not receive overtime for work performed on their phones after hours
  - Case went to bench trial in N.D. Ill., with judge concluding that the plaintiffs could have, but failed to request payment for this non-scheduled work, and the Bureau did not know plaintiffs were not paid for this work
  - Plaintiffs appealed, and the Seventh Circuit affirmed
  - Important case for defense attorneys, as Seventh Circuit emphasized:
    1. Knowledge that plaintiffs did some work on their electronic devices after hours in and of itself did not mean that this work was not being reported or compensated
    2. The Bureau had a policy and procedures in place for reporting time worked

More recent litigation

- *Garcia v. Draw Enterprises*, III, N.D. Ill., Nov. 19, 2018: Former employee alleged she was denied overtime. Evidence showed she was expected to be available to assist with payroll after hours, including through numerous e-mails with supervisors. Summary judgment denied: "If Draw did not want to pay Garcia overtime, it should have told her to disregard after-hours requests from her supervisors and colleagues rather than allowing and even encouraging her after-hours work to continue."
- *Jackson v. Haynes & Haynes*, N.D. Ala., 2017: Former paralegal sued law firm claiming she was owed overtime for work done after hours, including by responding to text-messages and work related emails, for a period of 3 weeks in 2014. Among other allegations, the employee tried to rely on an evening email and her supervisor's response by text stating that she should not send e-mails after hours due to overtime concerns. The court deemed that exchange *de minimus*, and granted the firm's motion for summary judgment.
- *Johnson v. Cameron Int'l Corp*., S.D. Tex., 2017: Another employer-friendly case, with summary judgment granted in favor of the employer. Former employee claimed unpaid overtime, including based on work done on electronic device after hours on the employer-provided computer and phone, but employer was able to successfully rely on its overtime policy requiring employees to accurately record and report all time worked, including overtime, and to show that former employee failed to follow this policy. Like the Seventh Circuit in *Allen*, the district court in *Johnson* ruled that receipt of after-hours emails, in and of itself, will not impute liability.
- *Alanis v. Tracer Indus. Mgmt. Co*., E.D. Tex., 2016: Plaintiffs claimed, among other things, that they were required to respond to work calls after hours. Applying the *de minimus* rule, court concluded that receiving after-hours calls a "couple of times," each lasting a minute or so, could not support an FLSA claim as a matter of law.

Best Practices and Litigation Defense Tactics

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Best Practices & Litigation Defense Tactics

Best Practices

1. Time Records
2. Written Policies and Practices
   A. Clock in/out policy
   B. Authorization to work overtime policy
   C. Technology use parameters policy
3. Enforcement of Policies and Practices
   A. Immediate intervention
   B. Discipline
4. Management Training
5. Technological Assistance
   A. Shut down/ limit access
   B. Own devices
   C. Clock in & out apps

Best Practices & Litigation Defense Tactics

Best Practices:

The interesting problem of exempt employees

1. What is an exempt employee?
2. What are the risks?
3. What should be done?

Best Practices & Litigation Defense Tactics

Best Practices: The Role of Class/Collective Action Waivers

Epic Systems Corp. v. Lewis: Supreme Court Approves Class/Collective Action Waivers in Employment Arbitration Agreements

Best Practices & Litigation Defense Tactics

Litigation Defense Tactics: Assuming no time records

1. De Minimus Rule

   → Under 29 C.F.R. § 785.47, in recording working time, insubstantial or insignificant periods of time outside the scheduled working hours that cannot practically be precisely recorded may be disregarded.

2. The Rounding Rule

   → Under 29 C.F.R. § 785.48(b), the payment of wages based on recording and computing time to the nearest five minutes, or the nearest one tenth or quarter of an hour, will be accepted

3. Definition of "Work"

   → "Work not requested but suffered or permitted is work time." 29 C.F.R. § 785.11

4. Passive v. active engagement

Best Practices & Litigation Defense Tactics

Litigation Defense Tactics Cont.

1. Offset based on premium pay

→ Extra premium compensation paid for the excess hours is excludable from the regular rate under section 7(e)(5) and may be credited toward statutory overtime payments pursuant to section 7(h) of the Act." 29 C.F.R. § 778.202.

2. Gather electronic data
3. Restructure the person's life
4. Lack of knowledge and authorization/consent

→ Under 29 CFR 785.12, if the employer knows or has reason to believe that the work is being performed, he must count the time as hours worked.

Collective & Class Actions

Basic Differences between Collective and Class Actions

1. Opt-in v. Opt-out
2. Section 216(b) v. Rule 23 requirements
3. Case management mechanism v. Representative Action
4. The Hybrid Action: FLSA and state wage/hour law claims

Collective & Class Actions

Defending Collective Actions

Section 216(b) under the FLSA

→ Section 216(b): Permits similarly situated individuals to consent to becoming a party

→ The effect of *Hoffman-LaRoche v. Sperling* (1989)

2-step process to Collective Action

1. Step 1: Conditional certification (lower standard)
2. Step 2: Decertification (higher standard)

Collective & Class Actions

Defending Collective Actions

Defense Tactics

1. Conclusory, insufficient evidence justified conditional certification
2. Attack scope of proposed conditional class
3. “Muddying the waters”
4. Timing of conditional certification motion
5. Stipulate to conditional certification
6. Fight for language in opt-in notices and limitations on communications
7. Establish lack of common practice and/or lack of similarly situated status

Collective & Class Actions

Defending Class Actions: *"As goes the claim of a named plaintiff, so goes the claim of the class"*

Main Rule 23 Requirements

1. Numerosity: Is the size of class to large to litigate individualized claims
2. Commonality: Common question of/and or fact
3. Typicality: claims of named plaintiff are typical of class
4. Superiority: Class action must be superior to other available methods of proceeding

Collective & Class Actions

Defending Class Actions Cont.

Defense Tactics

1. Establish insufficient number of class members
2. Establish there is no uniform policy or practice
3. Establish differences of jobs
4. Establish differences among types of devices
5. Establishes that a class action is not best/superior method
6. Attack plaintiff's data/statistical proof and demand liability should not be based on sampling
7. Demand plaintiff's establish how class action will be tried / object to plaintiff's trial plan
8. Stress that there would need to be bifurcation of liability and damages, which results in mini-trials