Avoiding FLSA Overtime Pay Claims for After-Hours Electronic Connectivity

Defining Work Time, Leveraging Defense Strategies and Defeating Class Certification

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THE COMPENSABILITY OF OFF-DUTY WORK

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What Is "Working Time?" When Is It Compensable?

Preliminary and Postliminary Activities: The Legal Framework

• Incidental time spent by employees before or after their workday on activities other than those integrated with their principal duties is compensable if compensation is called for by a contract between the employer and the employee or his union, or by the employer's custom or practice. If, however, there is no contract and there is no employer custom or practice calling for compensation, then the incidental time is not compensable.

• Incidental time spent by employees before or after their workday on activities, so-called preliminary and postliminary work, if sufficiently integrated with the principal duties is compensable. For example, a cashier balancing cash drawer before/after shift. In other words, if the employee cannot perform his principal job without first undertaking the preliminary activity and then, at day's end, the postliminary activity, the likelihood is that the time is compensable.
The other key factor is whether there is any employer compulsion to engage in the activity or come in early to accomplish the task(s).

The last issue for determining the compensability of such time is whether the "extra time" falls under the FLSA *de minimis* doctrine.

Insubstantial or insignificant periods of time, which cannot as a practical administrative matter be precisely recorded for payroll purposes, may be disregarded as *de minimis*. 29 CFR 785.47

Periods must be uncertain and indefinite time, a few seconds, a few moments.

An employer cannot disregard the time if it is a fix and regular part of the employee’s work and is regularly required to spend on the duties.

Early case held that $1 of additional compensation per week was not *de minimis*.

No clear understanding of what exactly qualifies as *de minimis*. Time spent receiving, prioritizing, and mapping assignments before commuting to work is *de minimis*. Rutti v. Lojack Corp. Inc., 596 F.3d 1046 (9th Cir. 2010). But see Brubach v. City of Albuquerque, 893 F. Supp. 2d 1216 (D.N.M. 2012) (five minute pre-shift meeting not *de minimis* because mandatory meeting does not constitute time “beyond scheduled working hours.”)
Changing Clothes, Showering, and Washing Under FLSA

• If employees change clothes, shower, or wash for their own convenience, hours worked is not affected, but they must be paid for the time spent in this manner if the activity is required by the nature of their principal duties, by the employer's rules, or by some law. However, an employee who elects to change into required clothing at home, rather than at work, need not be paid for time so spent.

• The donning and doffing of clothing are considered principal activities — and thus compensable — if they are integral and indispensable to an employee's work. Time spent on these activities during the workday proper probably would be compensable in all instances.
Union Contract Can Exclude Compensable Time From Hours Worked

- Even though time spent by the employees in changing clothes or washing at the beginning or end of a workday would be compensable hours worked under FLSA, such time can be excluded from hours worked if the union consents to having such a provision within the contract.
Travel Time

- The time employees spend commuting to and from their regular place of work each day is not work time, so employers do not have to pay employees for this time.

- Work time does include time spent traveling to another location for a special assignment, substantial travel for an emergency outside the normal working hours, and time spent traveling during regular work hours as part of the employee’s principal job duties.

- Time that an employee spends traveling as part of his or her principal activity, such as travel from jobsite to jobsite during the workday, must be counted as hours worked.

- If an employee reports to a central location to pick up equipment before proceeding to his or her assigned worksite, the time spent traveling to the central location is not work time. The time spent traveling to the assigned worksite is work time. But see Griffin v. S & B Eng’rs & Constructors, Ltd., 507 F. App’x 377 (5th Cir. 2013) (finding time spent commuting to and from job site on a company owned bus is not compensable even though riding on the bus is mandatory and while on the bus, employees are subject to company “rules of conduct.”

- Overnight travel or travel away from home is work time when it cuts across the employee’s normal workday and/or requires the employee to work on weekends or days when he or she would not otherwise be required to work.

- Travel between home and work in a company-owned vehicle is not paid work time as long as the travel is within the nominal commuting area for the employer’s business, and the use of the vehicle is subject to an agreement between the employer and the employee or the employee’s representative.
Training Time

Basic Conditions for Non-Compensability of Training Time:

• Attendance at lectures, meetings, training programs and similar activities need not be counted as working time if the following four criteria are met:
  • Attendance is outside of the employee's regular working hours;
  • Attendance is in fact voluntary;
  • The course, lecture, or meeting is not directly related to the employee's job; and
  • The employee does not perform any productive work during such attendance.
Involuntary Attendance

• Attendance is not voluntary if it is required by the employer. It is not voluntary if the employee is given to understand or led to believe that his present working conditions or the continuance of his employment would be adversely affected by nonattendance.
Training is directly related to an employee's job if it is designed to make the employee handle his job more effectively as distinguished from training him for another job, or to a new or additional skill.

Where the training course is instituted for the bona fide purpose of preparing for advancement through upgrading the employee to a higher skill, and is not intended to make the employee more efficient in his present job, the training is not considered directly related to the employee's job even though the course incidentally improves his skill in doing his regular work.
• If attendance at or participation in training programs, meetings, and lectures is required by an employer, the time must be counted as work time.

• If employees attend an independent school, college, or trade school after hours on their own initiative, the time is not counted as hours worked, even if the courses are related to the job.
The Minefield of "On-Call" Time: Waiting to be Engaged

The Supreme Court has held that time spent waiting for work is compensable if the time waiting is spent "primarily for the benefit of the employer and his business." The determination of whether time is spent principally for the employer's benefit depends upon all the circumstances of the case.

• Though the U.S. Department of Labor and the U.S. Supreme Court have been reluctant to establish a legal formula, courts and the U.S. Department of Labor, in dealing with this issue, focus on a two-prong inquiry:
  • The degree to which the employee is free to engage in personal activities; and
  • The agreements between the parties
In determining whether an employee is free to engage in personal activities, courts have considered a number of factors:

- Whether there was an on-premises living arrangement;
- Whether there were excessive geographical restrictions on the employee's movements;
- Whether the frequency of calls was unduly restrictive;
- Whether the fixed time limit for response was unduly restrictive;
- Whether the on-call employee could easily trade on-call responsibilities;
- Whether the use of a pager could ease restrictions; and
- Whether the employee had actually engaged in personal activities during the on-call time.
• The key question for determining if an employee must be compensated for waiting time and on-call time is whether the time in question can be used effectively for the employee's personal purposes.

• An employee who is on duty and waiting to be assigned a task is considered to be working. Generally, an employee is on duty when the time is controlled by the employer and is of relatively short duration. When the employee is completely relieved of duty, however, the time need not be counted as hours worked.

• If employees are completely relieved of duty for a period of time that is long enough to enable them to use the time effectively for their own purposes, such time need not be counted as hours worked. In such situations, the employees must be told in advance that they may leave the job and that they will not have to commence work until a specified hour.
  – For example, the time an employee spends waiting for a meeting to begin or the time a factory worker spends talking with co-workers while waiting for a machine to be fixed must generally be counted as work time.
• On-call time is different than waiting time, as it usually means that the employee is not on the employer's premises. On-call time must be counted as hours worked when the employee is required to remain on-call so that his or her time is so restricted that the employee cannot use it effectively for personal purposes.

• Simply carrying an electronic device used to notify an employee to return to duty does not usually qualify as hours worked. If the employee is free to effectively use the time for his or her own personal purposes, the time should be counted as hours worked.
Compensability of Lunch and Break Time

• There is no federal law requiring meal breaks in industries or offices. Breaks of up to 20 minutes, however, must be counted as work time, and those breaks that last more than 20 minutes need not be counted as work time, provided the employee is relieved of duty. This is true even if the employee is not permitted to leave the premises.

• (ii) Unauthorized extensions of authorized work breaks need not be counted as hours worked when the employer has expressly and unambiguously communicated to the employee that the authorized break may last for only a specific length of time, that any extension of the break is contrary to the employer’s rules, and that any extension of the break will be punished.
Smart Phone Usage

Overview: Today's World of Work

In recent years, the work day has become increasingly longer and longer and has more and more intruded into employees' personal time and lives. The blurring of the work day and personal time has allowed employers, perhaps without intending to do so or unwittingly, to demand more of their employees to "keep up" even if these increased demands mean that employees are performing work-related tasks at home or at night or, even, on the beach while on vacation.
Against this backdrop is the advance of technology, which, for many employees, has become a wireless balls and chain. For example, Blackberry’s and iPhones make it much easier to contact a worker's colleagues, but it also makes it very hard to "ignore" e-mails and messages sent. One study shows that 50% of employed e-mail users check their e-mails over the weekend. One quarter of these employees are expected to check their e-mails. Almost one-half of Blackberry users are expected/required to respond to after-hours/weekend messages. We are at a point in today's society where employees are under an almost "electronic siege."
Why do employees put up with this or allow themselves to never be disconnected from their work? Perhaps the answer is as simple as the fear of losing one's job. In a poor economy, where unemployment is at record numbers and as white collar jobs start (quickly) to follow blue-collar jobs overseas, white-collar workers are finding themselves under greater pressure to justify their jobs and keep them.

These circumstances have now resulted in a new kind of wage-hour claims (usually in the context of a collective or class action suits) being asserted by employees. These claims involve demands for compensation (usually overtime) for work performed, work that consists of the checking of e-mails and the responding to messages and e-mails, etc. This is the newest danger confronting employers and a situation that they must be able to monitor and control, whether with policies and/or explicit directives to employees.
Determining the legitimacy of an overtime claim under the Fair Labor Standards Act ("FLSA") will depend on whether the employee's use of a home computer, laptop, PDA, blackberry, smart phone and similar devices fits into the FLSA's broad definition of work. The FLSA does not explicitly define "work," but the Supreme Court has broadly defined it as "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." *Tenn. Coal, Iron & R.R. v. Muscoda Local No. 123*, 321 U.S. 590, 598 (1944).
• "Work" need not be an activity specifically directed or ordered by the employer, but includes productive activity that is "suffered or permitted" by the employer. Id.

• (iii) Naturally, any implicit "pressure" to perform these activities will be deemed to show sufficient employer compulsion to convert the activity into compensable work time.

• (iv) *Ritter v. The Ready Set Companies*, 1:06-cv-06605 (N.D.Ill 2006). Plaintiff filed suit pursuant to the FLSA and Illinois Minimum Wage Law to recover unpaid overtime wages for unpaid overtime. Plaintiff alleged that defendant owed him for fifteen minutes of overtime wages for a period of one year and seven months for every day worked. Plaintiff alleged in the Complaint that Defendant required service agents to carry a PDA and required them to upload information to a centralized database maintained by Defendant from their homes every day. Similarly, defendant required Service Agents to download and review information on their PDAs during their off hours.
  – The plaintiffs alleged that they could not perform these duties in their stores as there was no internet service available to them there.
  – The parties reached a confidential settlement agreement in May 29, 2007.
- **Braniff v. DirectSat USA, LLC, 0:09-cv-02168-DWF-SRN (D.Minn 2009).** Plaintiffs filed suit pursuant to the FLSA and the Minnesota Fair Labor Standards Act to recover unpaid overtime wages for unpaid overtime for the statutorily period permitted. Plaintiffs alleged that they and similarly situated employees were required to check their employer issued PDAs each morning; acknowledge jobs by logging in; send acknowledgements to their employer; and, notify the employer of their approximate arrival times at customer locations.
  - The parties entered into a stipulation for dismissal without prejudice on November 25, 2009 after a confidential settlement.

- **Agui v. T-Mobile USA, Inc., 1:09-cv-02955-RJD-RML (E.D.N.Y. 2009).** Plaintiffs filed suit pursuant to the FLSA, New York Labor Law Sec. 650, and California Labor Code to recover unpaid overtime wages for unpaid overtime. Plaintiffs, several former and current employees sued T-Mobile, claiming that they were "required to use company issued smart phones to respond to work messages after hours without pay."
  - Plaintiffs alleged that they and the 36,000 similarly situated employees nationwide were entitled to overtime wages for the ten to fifteen hours they spent every week "reviewing and responding to emails, texts, and phone calls."
  - The parties reached a confidential settlement agreement in May 5, 2010.
Prescott v. Prudential Insurance Co., 2:09-cv-00322-DBH (D. Me. 2009). Plaintiffs filed suit pursuant to the FLSA and the Maine Wage and Hour Laws to recover unpaid overtime wages for unpaid overtime. Plaintiffs, several former and current similarly situated employees have joined suit to sue Prudential for approximately twelve hours of overtime per week for the statutory period that they were not compensated for, but worked off the clock on their home personal computers.

- Significantly, the class was certified, notwithstanding the existence of a policy that forbade overtime work without prior authorization. The Court determined that the employer had a practice of allowing off-the-clock work to be performed and that the employer essentially "suffered and permitted" the work to be done.
- The Plaintiff received a conditional certification of the class and additional parties continue to join the collective action suit under an Order allowing for late filing.
• *Rulli v. CB Richard Ellis, Inc.*, 2:09-cv-00289-PJG (E.D.Wis 2009). Plaintiffs filed suit pursuant to the FLSA to recover unpaid overtime wages for unpaid overtime. Plaintiff and similarly situated employees in the collective action, allege that they were required to use PDAs and Blackberries beyond normal working hours to respond to emails and text messages from supervisors. The class is expected to include perhaps thousands of employees.
  – Another allegation is that the plaintiffs had to respond to incoming e-mail messages (and phone calls) within fifteen minutes of receiving the message or phone call.
  – Another allegation is that this work is "suffered and permitted" to be done and also that the time records which were kept did not allow for the recording of all time allegedly worked.
• *Allen v. City of Chicago*, 1:10-cv-03183 (N.D.Ill 2010). Plaintiffs filed suit pursuant to the FLSA to recover unpaid overtime wages for unpaid overtime. Plaintiff and similarly situated employees in the collective action allege that they were required to use PDAs and Blackberries beyond normal working hours as they were on call 24 hours a day and seven days per week. Plaintiffs would receive phone calls, emails, and work orders while of the clock and were not compensated for responding to these communications, which occurred throughout the night and into the early morning hours (according to the Complaint).
  
  – Plaintiffs allege that it was mandated department policy to respond to the messages or calls within a short period of time of receiving the message.
  
  – Plaintiffs also allege that the work performed by the Chicago Police Department would be less efficient and not as successful, without this routine off-duty work. The class could conceivably include many of city of Chicago’s 37,000 employees. The Court granted conditional certification.

• Time technician spent reading e-mails from companies that provided satellite installation services listing his work assignments for the next day, mapping out directions, and prioritizing his routes was not compensable under the Fair Labor Standards Act (FLSA); such tasks were related to technician's commute. *See Butler v. DirectSAT USA, LLC*, No. CIV.A. DKC 10-2747, 2014 WL 5342729 (D. Md. Oct. 16, 2014).
Validity of Automatic Meal Deduction Policies:

- Overview under the FLSA, an employer is justified not to count a lunch period as working time if the period is at least thirty minutes in length and the employee is relieved of all work duties. 29 C.F.R. 785.19(a). There is no requirement that the employee be allowed to leave the premises. 29 C.F.R. 785.19(b).

- DOL - Wage & Hour Opinion Memorandum — FLSA2004-22 (November 22, 2004): As explained in Section 785.19, bona fide meal periods are not working time under the Act. Bona fide meal periods are those in which an employee is relieved from all duties for the purpose of eating regular meals. They are not coffee breaks or time off for snacks, which are in reality rest periods. Generally, 30 minutes is considered sufficient time for a meal period. Under special conditions, a shorter period may be long enough.
Automatic deduction policies (i.e. deducting thirty minutes per day for lunch) do not violate the FLSA unless employees give notice that they missed their lunch. The Employer, however, is well advised to institute a policy or procedure through which employees can claim payment for a missed lunch hour(s), after investigation and confirmation by management that time was worked.

Reinforced principle that meal periods are not work time and that, ordinarily, 30 minutes or more is long enough. Meal periods of less than 30 minutes in which the employee is completely relieved from duty for the purpose of eating may be bona fide, and thus not considered hours worked under special conditions.

Automatic deductions for meal time are permissible as long as the numbers of hours worked each day and each week by each employee are accurately recorded to protect against successful litigation, employers are well served to create a failsafe mechanism to track and capture any claimed work time for missed lunches.

Unauthorized extensions of authorized work breaks need not be counted as hours worked when the employer has expressly and unambiguously communicated to the employee that the authorized break may last for only a specific length of time, that any extension of the break is contrary to the employer’s rules, and that any extension of the break will be punished. If the employee commences work before the full 30-minute lunch period has ended, the employee must be compensated for this work time.
Current Automatic Meal Deduction Cases

- **Frye v. Baptist Memorial Hosp., Inc., 2:07-cv-02708-SHM-CGC (W.D.Tenn. 2007), aff’d 2012 U.S. App. LEXIS 17791 (6th Cir. 2012).** A former nurse filed a putative FLSA collective action, challenging the hospital’s policy of making automatic deductions for mandatory 30-minute meal breaks at each of its three hospitals. Under hospital policy, in the event an employee’s meal break was interrupted, another uninterrupted break period would be provided, or the employee would be paid for the entire meal break. Payment was dependent, however, on the employee making a note on an exception log, or otherwise notifying a supervisor of the missed break. The nurse also alleged that he was not compensated for his interrupted meal breaks.

- On appeal, the Sixth Circuit agreed that the plaintiff’s evidence was insufficient to demonstrate that the plaintiffs were similarly situated and experienced a common FLSA violation. The Sixth Circuit further found that to the extent some plaintiffs voluntarily failed to report work performed during meal breaks, the hospital had no reason to know of such work and therefore was not liable to pay for it.

- **Significantly, the Sixth Circuit found that the fact that an automatic deduction policy shifts the burden to the employees to affirmatively cancel that deduction if they work through lunch does not, by itself, violate the Fair Labor Standards Act.**

- After reviewing the depositions and declarations submitted by the plaintiffs, the Court also held that there were a number of reasons accounting for the failure to pay employees for lunch, including lack of knowledge of the override system, manager statements that lunch breaks would not be overridden and the employees’ failure to avail themselves of the override procedure.

- The result was that the claims of the individuals were re-filed in thirty-two (32) states and the number of individuals with claims rose to 290.
• But see Asirifi v. West Hudson Sub- Acute Care Center LLC, 2013 WL 486136 (D.N.J, 2013). (automatic meal break deduction policy permissible, however, the burden is on the employer to keep logs to ensure accurate reporting of those who work through their break).
Under the FLSA, employers are required to pay all non-exempt employees at least the minimum wage for all hours worked, as well as overtime for hours worked in excess of 40 hours. A significant legal risk arises when non-exempt employees are permitted to work from home. It becomes difficult for employers to account for the hours telecommuting employees are actually working, if they are not clocking into and out of the office.

• The FLSA does not differentiate between non-exempt employees who work on-site versus those employees who telecommute, or, work from a remote location.

• The biggest concern is that non-exempt employees will make claims that they worked off-the-clock. However, employers should take advantage of modern technology to avoid false or misleading claims.
• Employers who do not strictly keep records relating to hours worked for telecommuting employees will have a harder time disproving allegations of FLSA violations. To avoid this issue, employers should create computer systems that employees are required to check in and out from, to ensure that remote workers are not discretely working hours without the employers’ knowledge.

• Employers should also establish a summary of the telecommuting process in writing and have the employee sign off on the process. The document should set out the framework for the telecommuting assignment, the number of hours the employee is expected to work, how hours are to be recorded, and emphasize that non-exempt employees should not abuse the system to discretely work overtime.
Waiting for Employer’s directions:

Where a telecommuter claims that their employers require them to be readily available and/or waiting for work during the day, determination of whether such time should be compensated is extraordinarily fact-specific. Employers should closely examine the nature of the work performed by telecommuting employees as well as the amount of time employees spend waiting for work or instructions.
Traveling to a worksite

Generally, travel time to and from work does not constitute hours worked. However, if travel occurs after the employee’s first principal activity in the workday, such travel time will be compensable. If a telecommuting employee attends an in-person meeting or training, the employee’s travel time may be compensable, depending on several factors, including, but not limited to:

- The frequency with which the employer requires the employee to travel to the employer’s worksite
- The distance from the employee’s home to the employer’s worksite
- Whether such travel occurs after the employee has started his or her workday or occurs during normal work hours.
Rounding

The Federal Fair Labor Standards Act requires employers to pay employees for "all hours worked."

Rounding is exemplified by the following situation:

• An employer utilizes time clocks to record employee start and stop times for payment purposes
• As employers, especially those with many employees, cannot expect all employees to clock in at the exact scheduled start time, federal regulations permit employers to round start and stop times to the nearest five minutes, the nearest one-tenth or nearest quarter of an hour
• This practice presumes an employer's rounding arrangement will average out over a representative period of time so that employees are fully compensated for all time worked
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Please visit Fox Rothschild's Wage & Hour — Developments & Highlights
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Avoiding FLSA Overtime Claims for After-Hours Electronic Connectivity

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Compensable Time Cases

Extensive litigation over whether time spent performing tasks before “clocking in” or after “clocking out” is compensable

- Donning and doffing
- Waiting time before start of shift
- Computer boot-up / boot-down
- Security checks
Potential Exposure

Wage/hour litigation is pervasive in federal and state courts throughout the country

- DOL’s Wage & Hour Division reports that in FY 2013 the agency recovered $250 million in back wages for employees
- President has proposed 11% increase in DOL budget to $13.2 billion, including adding 300 employees for wage/hour enforcement

Remedies typically sought in “off-the-clock” actions

- Possible class/collective action if common policy of employees working off-the-clock without compensation
- FLSA remedies: unpaid overtime, minimum wage, liquidated damages
- State law remedies (depending on jurisdiction): unpaid wages, inaccurate wage statements, failure to provide meal /rest breaks, etc.
- Also possible injunctive relief, civil penalties, attorneys’ fees
Non-Exempt Employees

Continuous Workday Rule

- Commute time spent before start and after end of workday generally is not compensable, but travel time during workday is compensable
- Issue: when does the workday start and end?

Keubel v. Black & Decker, 653 F.3d 352 (2nd Cir. 2011)

- Employees were required to synch PDAs with company server at home, also checked and responded to emails and did other tasks
- Court ruled at-home activities did not render commute time compensable under FLSA
  » Employees had flexibility to decide when to complete at-home tasks, were not required to do them immediately after returning or before leaving home
  » Under these facts, time spent working at home was not part of a continuous workday so as to make commute time compensable
Non-Exempt Employees

Rutti v. Lojack Corp., 596 F.3d 1046 (9th Cir. 2010)

- Employees were required to upload data after returning home, and had to receive, map and prioritize jobs and routes before leaving
- Court ruled employees could perform the at-home tasks anytime from 7pm and 7am, so not part of a continuous workday and commute time was not compensable under FLSA

Compensability of off-the-clock time in Kuebel and Rutti

- Kuebel and Rutti appellate decisions both found there were triable issues of fact as to whether employees were entitled to compensation for time spent performing certain at-home tasks
Issue: exempt employees checking email while on vacation, deducting vacation time from their vacation leave bank

*McBride v. Peak Wellness Center,* 688 F.3d 698 (10th Cir. 2012)

- OK to deduct partial day absence from exempt employee’s vacation or leave bank without violating salary test
- Citing DOL Opinion Letter FLSA2009-18


- California law in accord with federal law on partial-day deductions from exempt employee’s vacation or leave bank
General Defenses

*White v. Baptist Memorial Health Care Corp.*, 699 F.3d 869 (6th Cir. 2012)

- Company auto-deducted for meal breaks, had established policies where employees could report missed meal breaks in an exception log and be paid, and for reporting and correcting payroll errors
- Employee sued for unpaid missed meal breaks, but did not report them in exception log or utilize payroll correction procedure
- “Under the FLSA, if an employer establishes a reasonable process for an employee to report uncompensated work time the employer is not liable for non-payment if the employee fails to follow the established process.”
- “When the employee fails to follow reasonable time reporting procedures she prevents the employer from knowing its obligation to compensate the employee and thwarts the employer’s ability to comply with the FLSA.”
General Defenses


• Employee worked off-the-clock without following time reporting procedures or telling anyone, alleged company had unwritten policy because he was subject to disciplinary action if he did not get work done or failed to stay within budget and only way to comply was to work unreported overtime

• Employer was not liable, no evidence that the company had actual or constructive knowledge of unreported overtime hours
Potential Issues

- Does the employer have reasonable, established procedures for tracking work time and reporting uncompensated work time?
- Can the employer establish that its time reporting procedures were disseminated to employees?
- Did the employer discourage employees from using its time reporting procedures?
- Was the employer otherwise notified that employees were working without being compensated?
Class / Collective Action Defenses

*Fernandez v. Wells Fargo*, Case No. 12 Civ. 7193 (S.D.N.Y. 2013)

- No evidence of common policy of not recording hours worked, or of a common mode for exercising managerial discretion that pervaded the entire company
- No evidence that plaintiffs’ claims were typical of the proposed class
- No evidence of preponderance, that proposed classes were sufficiently cohesive to warrant adjudication by representation
- “Plaintiffs have not made the modest factual showing that they and potential opt-in plaintiffs together were victims of a common policy or plan that violated the law.”
Class / Collective Action Defenses

Mandatory Employment Arbitration With Class Waiver

AT&T Mobility v. Concepcion, 131 S.Ct. 1740 (2011)
• U.S. Supreme Court enforced mandatory individual arbitration with waiver of class claims, held Federal Arbitration Act (FAA) preempted contrary state laws

American Express v. Italian Colors Rest., 133 S.Ct. 2304 (2013)
• U.S. Supreme Court reinforced holding in Concepcion, rejected defense that class action was necessary for effective vindication of rights

Iskanian v. CLS Transportation, 59 Cal.4th 348 (2014)
• Cal. Supreme Court ruled that Concepcion mandated enforcement of employment arbitration agreement with class waiver, but ruled the class waiver would not apply to “representative” claims for Labor Code civil penalties under PAGA
Class / Collective Action Defenses

Mandatory Employment Arbitration With Class Waiver

National Labor Relations Board

• NLRB position is that the right to bring a class action on wages, hours, working conditions is protected concerted activity under NLRA § 7

• NLRB position was rejected by four Circuit Courts of Appeal in 2013: Sutherland (2nd), D.R. Horton (5th), Owen (8th), Richards (9th)

• NLRB policy of non-acquiescence

Executive Orders

• Fair Pay and Safe Workplaces Executive Order issued in 2014 restrict federal contractors/subcontractors (contracts in excess of $1 million) with regard to mandatory arbitration of claims arising under Title VII or a sexual harassment tort
Pros and Cons of Mandatory Employment Arbitration

Potential Advantages

• No jury trial
• Dispute is decided by a subject matter expert, possibly a retired judge
• Procedure is less public, opportunity for greater confidentiality
• May be faster, more streamlined than a court trial
• Possibility of eliminating class action exposure

Potential Disadvantages

• Company and employee are mutually bound to arbitrate claims
• If required as a condition of employment, company may have to pay the full cost of arbitration including arbitrator’s fees
• Arbitrator is less likely to dismiss the case in a pre-trial motion: i.e., motion to dismiss or motion for summary judgment
• Little recourse to challenge erroneous decision
Checklist

- Strong policies prohibiting “off-the-clock” work, requiring employees to document and be paid for all time worked
- Protocols for employees to document all work time and report any time worked after hours
- Documentation that time reporting policies and protocols have been disseminated to employees
- Manager / supervisor awareness of time reporting policies and protocols, and how to respond if notified of deviation
- Consistent enforcement