



Hear No Unreported Time, See No Unreported Time

EXAMINING THE ROLE OF EMPLOYER POLICIES IN OFF-THE-CLOCK CLAIMS

Insights

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Some courts have read a safeguard into federal wage and hour law that can protect employers from liability for working-off-the-clock claims, believing you should not be responsible for unpaid overtime or minimum wage if you didn't know, and should not have known, that an employee was working off the clock. But what does it mean under the law whether an employer knew or should have known? And how is this analysis affected if you have a policy requiring employees to report all time worked, even if outside of normal work hours and while not clocked in? There is no single definitive answer, but several courts around the country provided valuable guidelines on how you might increase your chances of successfully defending against an off-the-clock lawsuit.

The Basics

The Fair Labor Standards Act (FLSA) requires that most non-exempt employees are compensated not less than the federal minimum wage (currently \$7.25 an hour) for all hours worked, and at least 1 1/2 times their regular rate for any hours worked exceeding 40 in a workweek. So it follows that employers must keep accurate records of all hours worked by their employees.

Assuming an employer keeps time records, an employee who claims they worked additional time that wasn't captured on the time records and for which they were not compensated bears the initial burden of proving they actually worked that time. If the employee presents evidence of time record inaccuracies about which the employer knew or should have known, and as a result the employee's pay didn't meet the FLSA requirements, the burden shifts to the employer to prove the employee didn't actually work additional time. This can be a very difficult task.

What Leads To An Off-The-Clock Claim?

Typically, off-the-clock claims arise when an employer keeps what it believes are accurate time records but an employee alleges they actually worked more – often much more – than what is reflected. Some of the more common situations where the question of whether the employer knew or should have known of this purported off-the-clock time include when an employee works through lunch and the employer has an automatic deduction for lunchtime; supervisors directing or allowing employees to work prior to clocking in or after clocking out; waiting for a computer to boot up to clock in for the day; donning and doffing uniforms; and short unpaid rest breaks.

When Is An Employer Expected To Know That Time Was Worked?

At what point does an employer become potentially liable for an employee's time worked off the clock due to its knowledge, whether actual or constructive, of the time in question? Although it really depends upon each case, several courts have recently contemplated what circumstances can justify such a claim. Often these cases also address an employer's policy requiring employees to accurately report all time worked off the clock, and whether that changes the court's analysis.

Let's use an example where a company automatically deducts one hour from its non-exempt employees' time records each day for a presumed lunch break. First, a company must have a well-crafted policy that directs employees to accurately report all time worked, and to report to the company if directed by a supervisor to work off the clock without reporting the time or if their time is improperly adjusted without their knowledge and assent. Assuming such a policy is in place, some courts have embraced the idea that it can cause the burden to shift to the employee to explain how unpaid time can be reconciled with the policy.

In these situations, several courts have stated that the relevant inquiry is not whether the employer knew the employee was working, but instead whether the employer knew the employee was not paid according to the FLSA requirement for that work. Therefore, if an employer establishes a reasonable process for employees to report uncompensated work time, the employer may argue that it is not liable for non-payment when an employee fails to follow the established process.

Of course, not all courts have adopted this approach, and several have been outright hostile to it. Even the courts to embrace a burden-shifting approach have held the principle has reasonable boundaries. A review of more than a dozen cases applying this principle suggests the outcome generally turns on how reasonably the parties acted in the situation.

When an employee fails to report that they worked through lunch in contravention of an employer policy, and no other circumstances are present, the employer can arguably avoid liability. But if an employer's acts or omissions led to the underreported time, it typically loses. For example, if an employee alleges their supervisor directed them to clock out but continue working, it is virtually certain a court would not allow the employer to rely upon its written policy to escape a resulting FLSA claim.

Off-The-Clock Claims: A Litigation Wish List

There is no way to guarantee a successful defense to an off-the-clock claim because, due to its very nature, there is no surefire way to keep an accurate record of alleged "unreported" time. But the chances for a successful defense are increased substantially when you take the following steps:

- Keep accurate records of time worked.
- Develop, explain, and rigorously enforce a well-written policy requiring employees to accurately report all time worked and expressly prohibiting unreported work.
- Train your managers on FLSA requirements, any applicable state or local wage laws, and company policies regarding proper timekeeping.

- Develop a system that allows employees to keep accurate worktime records even when not in the workplace.
- Discharge or, at a minimum, strongly discipline any manager who requires or permits employees to work off the clock, unilaterally decreases an employee's worktime without concurrence by the employee, or fails to ensure non-exempt subordinates follow a well-crafted company policy requiring them to accurately record all time worked.

Finally, if you get sued for an off-the-clock claim, think about all of the sources of information that can be used to establish or recreate the time an employee worked, or to otherwise impeach the employee's testimony that they worked "80 hours a week, every week." To stay a step ahead, we recommend you spend some time now reviewing your processes to ensure you are able to retrieve, analyze, and reproduce the following: computer log-in and log-out records; reports that show the timestamp of the first and last emails sent each day; video or surveillance footage of workplace entrances and exits; company telephone logs; GPS logs of company-controlled and owned vehicles; time records of other employees in the same or similar positions; time records of exempt individuals; and company-issued cell phone and text message records between employees and others.

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