

Insights, News & Events

## WEB EXCLUSIVE: SHOULD EMPLOYEES RECEIVE COMPENSATION FOR OFF-THE-CLOCK CELL PHONE USE?

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You might hate to admit it, but it's true: mobile devices are the adult version of a toddler's teddy bear. They give us comfort and a sense of belonging. We carry them everywhere and traveling without them makes us feel like a piece of ourselves is missing. Whether checking email, texting, or mindless scrolling through social media applications, most adults are quite dependent on mobile devices.

But what happens when your mobile device habits bleed into work? Off-the-clock smartphone work has caused quite the conundrum for employers when it leads to wage and hour claims. More and more, answering a quick email, text, or phone call outside of the workplace has blurred the lines of what is and what is not considered compensable "hours worked." Many employers have chosen to turn a blind eye to the thorny issue of work performed on mobile devices outside of employees' regularly scheduled shifts, hoping not to create a problem where one (seemingly) does not currently exist. Employers should, however, focus some effort on regulating off-the-clock smartphone work to minimize claims for unpaid overtime compensation. A very recent case illustrates the dangers you may face if you ignore this problem.

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## **ORGANIZED CRIME OFFICERS ORGANIZE TO FILE WAGE CLAIM**

On August 3, 2017, the 7th Circuit Court of Appeals issued a favorable decision for an employer in an off-the-clock case turning on the issue of whether the employer had knowledge of the work performed. In *Allen v. City of Chicago*, the court held that the Chicago Police Department (CPD) was not liable for overtime compensation because it lacked actual or constructive knowledge that the plaintiffs did not receive overtime compensation for performing off-duty work on their smartphones.

The complaint was filed by Jeffrey Allen and 51 opt-in plaintiffs who were current or former members of the CPD's Bureau of Organized Crime. Their jobs required them to investigate sophisticated matters including gangs, narcotics trafficking, and human trafficking. The Bureau issued mobile electronic devices to all members, as their jobs occasionally required off-duty work on their devices. To ensure compensation for such time, CPD permitted officers to submit "time-due slips" requesting compensation for such off-the-clock work. However, the plaintiffs alleged there was an unwritten policy preventing or discouraging the reporting of overtime smartphone work, and filed a legal action under the Fair Labor Standards Act (FLSA).

This federal statute requires employers to compensate non-exempt employees at time and a half for all time worked over 40 hours in a workweek, but for law enforcement employees, overtime compensation is required if the individual works more than 171 hours per 28-day period. When an employer has actual or constructive knowledge that the work is performed, the law obligates it to compensate for overtime work. As the 7th Circuit previously noted, "employers must, as a result, pay for all work they know about, even if they did not ask for the work, even if they did not want the work done, and even if they had a rule against doing the work." Constructive knowledge is found where an employer, through reasonable diligence, "should have" known work was being performed.

For example, an employer may exercise reasonable diligence where it establishes a workable process for an employee to report unpaid work time. But if an employer prevents or has an unwritten policy discouraging employees from reporting their time, the presence of a process for reporting unpaid time will not shield the employer from liability.

## **TWO COURT DECISIONS FALL IN FAVOR OF DEPARTMENT**

Some of the plaintiffs testified the Bureau “frowned on submitting slips for smartphone work.” They also provided evidence of a Bureau policy entitled, “General Orders,” guiding employees’ use of department-issued devices, and defining circumstances under which use of a smartphone would be considered “hours worked.” Despite these arguments, the trial court concluded the plaintiffs failed to establish the Bureau had actual or constructive knowledge that compensable work was performed on the smartphones for which the plaintiffs were not paid, or that plaintiffs neglected to submit slips accounting for their unpaid smartphone work. The officers appealed the decision to the 7th Circuit, which issued its decision early last month.

On appeal, plaintiffs argued that the lower court erred in holding the Bureau lacked knowledge of the underreported overtime hours. The appeals court said that although the employer might have known of the time worked, it also facilitated a reporting procedure to account for unpaid time. Because the plaintiffs opted not to take advantage of this process, the appeals court agreed there was no overtime liability.

## **WHAT EMPLOYERS NEED TO KNOW**

This case illustrates that the issue of whether an employer had actual or constructive knowledge of work being done by their employees is not going away anytime soon. In the modern workplace, an increasing number of non-exempt employees conduct work remotely on cell phones, so you can expect to see an increase in the number of these types of claims.

Here are some helpful tips you should consider in order to avoid landing on the wrong side of a legal decision:

- If possible, allow smartphone use for exempt employees only and restrict the availability of mobile devices for non-exempt employees. If you do issue mobile devices, be clear that work performed on these devices outside of work hours may be compensable and should be reported to management.
- Establish time reporting policies. Employers should clearly articulate a comprehensive, written policy regarding the use of smartphones, and include processes for employees to report any unpaid time. For example, the employer in this case maintained a policy requiring employees to submit "time-due slips" requesting compensation for unpaid time.
- Have employees regularly review their daily and weekly hours worked to confirm that they are reporting, and thus compensated for, all hours worked.
- Consider an email curfew policy, cutting off employees' access to conduct cell phone work at a certain time each day and on weekends.
- Train your employees on time management. Encourage them to perform work within the hours of their work day so as to minimize the amount of work conducted off-site or after regular hours.
- Regularly communicate the time reporting policy to employees through ongoing training and reminders.
- Conduct regular audits to ensure employees are reporting all hours worked.

## **CONCLUSION**

Technology has changed the American workplace and lawsuits of this nature will no doubt continue to spring up. The best way to avoid or minimize these claims is to

be proactive and address this thorny issue before you find yourself defending a wage and hour lawsuit.

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