"I'm Not Paying For That": Update On Using Timekeeping Policies To Defend Off-The-Clock Claims

Insights
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We have recently focused upon the growing number of federal court decisions under the federal Fair Labor Standards Act that have given legal weight to carefully-crafted, well-maintained employer policies requiring employees to report all of their worktime. Several such courts have relied upon the principle that workers can recover FLSA-required wages for alleged off-the-clock work only if the employer had actual or constructive knowledge of the work.

In essence, these decisions have said that, in the right circumstances, an employee who did not comply with such a timekeeping policy must affirmatively show that the employer knew or should have known about the work. Of course, the employer must not have done anything to cause the worker to not report the time or to interfere with or frustrate his or her doing so (for example, telling employees not to record overtime, refusing to pay for reported time, punishing employees for reporting worktime, or adjusting time totals downward when overtime was recorded).

Recent Ruling Advances Concept

The 7th Circuit U.S. Court of Appeals (with jurisdiction over Illinois, Indiana, and Wisconsin) has joined the 5th, 6th, 9th, and 10th Circuits in deferring to such an employer policy. In *Allen v. City of Chicago*, the court considered whether the City owed unpaid FLSA overtime wages to members of the Chicago Police Department's Bureau of Organized Crime for unrecorded time they spent checking their Blackberry® devices.

In a very helpful opinion for employers, the court acknowledged that the officers' time represented FLSA "hours worked". It also recognized that the City was aware that officers were spending some time using mobile devices for work outside of their typical workday. The court nevertheless held that these factors did not create an obligation to pay additional FLSA wages, because the City did not know that the officers failed to report the time, as was contemplated by the City's policy. The court found it particularly important that, when officers *did* record time worked outside of their normal schedules (whether on a Blackberry® or otherwise), the City took this work into account in calculating their wages.

The officers contended that "constructive knowledge should be found whenever the employer could have known about uncompensated work through, for example, examining all its records." In their view, "the Bureau could have discovered [their] uncompensated Blackberry work by comparing the

time slips to call and email records the Blackberrys generated, and so . . . it should have had constructive knowledge of the unpaid work." The court expressly rejected this approach, stating that the relevant inquiry is what a reasonable employer *should* have known — not what it *could* have known — and that reasonable diligence would not include such a detailed review of records.

The Bottom Line

The 7th Circuit's ruling further illustrates the value of well-crafted, thoughtfully-implemented, and rigorously-observed timekeeping policies.

But *EMPLOYER BEWARE*: None of these cases sanction a set-it-and-forget-it approach. Even the best policy will be fully effective only if employees follow it and managers and supervisors see that it is carried out. Thorough training and continuous reinforcement will be important if the current legal trend is to have maximum value.

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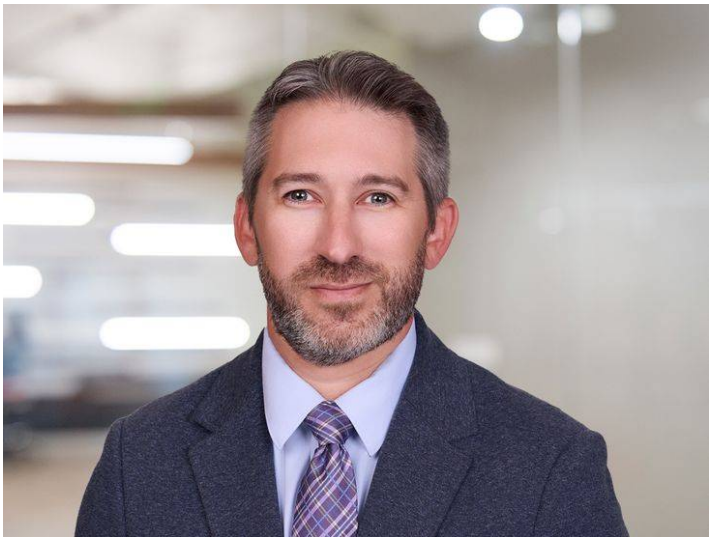

Marty Heller
Partner
404.231.1400
Email