A Recent Off-The-Clock Case Should Not Breed Complacency

Insights
12.18.12

It might sometimes seem from the parade of headline-grabbing, employee-favoring court decisions that employers are destined to lose in so-called "off-the-clock" cases under the federal Fair Labor Standards Act. These lawsuits involve claims by non-exempt employees that the employer has failed to pay the FLSA-required wages for work that went unrecorded. But a ruling by the 10th Circuit U.S. Court of Appeals (with jurisdiction over Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming) in *Brown v. ScriptPro* shows that, with the right policies, systems, and practices in place, it ***is*** possible for an employer to prevail.

The Good News . . .
Brown claimed that he was entitled to overtime compensation for work he performed at home. However, he produced no evidence of the amount and extent of this work, including that he did not record any of it in ScriptPro's timekeeping system, which he could have accessed from home. ScriptPro required employees to record all worktime, and apparently it enforced this requirement.

The court ruled that Brown had no FLSA claim. In the court's view:

◊ ScriptPro kept accurate records of employees' hours worked;

◊ Brown could have recorded his work in ScriptPro's system, but he did not;

◊ Brown had kept no other records to document the amount of time he worked; and

◊ Brown did not otherwise carry his burden to demonstrate as a matter of just and reasonable inference how much time he claimed to have worked.

. . . But Keep It In Perspective
The soundbite point drawing attention to this case in the news is the court's statement that, "where the employee fails to notify the employer through the established overtime record-keeping system, the failure to pay overtime is not a FLSA violation." However, the court's lead-in qualifier for that statement was, "[u]nder these circumstances". Had there been a dispute about whether ScriptPro kept accurate time records, for example, the result might have been different.

Employers should not assume that courts will decide this way no matter what the situation is, or that meeting their FLSA timekeeping obligations is simply a "set it and forget it" matter of publishing a

policy. Instead, the prospects for a positive outcome will be improved by:

◊ Determining all the activities that count as FLSA "hours worked";

◊ Developing systems and policies for accurately capturing all such worktime;

◊ Communicating those systems and policies to the employees;

◊ Requiring managers and supervisors to enforce those systems and policies; and

◊ Monitoring time records to evaluate whether they are accurate.

Brown v. ScriptPro represents a sound, commonsense result on a particularly good set of facts for the employer. Other employers would be wise to do all they reasonably can to see that their circumstances will be similarly favorable if there is an off-the-clock claim.

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