"Constructive Knowledge" Off-The-Clock Claim Rejected

Insights
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Another federal appellate court, this time the 5th Circuit U.S. Court of Appeals (with jurisdiction over Mississippi, Louisiana, and Texas) has rejected an employee's claim to have been entitled to federal Fair Labor Standards Act overtime compensation for unreported hours worked over 40 in a workweek. Readers will recall our 2012 post discussing a decision from the 10th Circuit saying that, under the right circumstances, an employee's failure to report all hours worked can be fatal to such an "off the clock" claim.

In *Fairchild v. All American Check Cashing, Inc.*, the plaintiff insisted that she was due overtime compensation for worktime she had not reported but as to which computer-usage reports showed her to be working after she had clocked-out. She argued that these computer records proved that her employer had constructive knowledge of her unrecorded work.The 5th Circuit disagreed.

Was There "Constructive" Knowledge?
The appeals court first observed that the question was not whether the employer had the *potential* ability to discover that the plaintiff had worked unreported time.Rather, the court said, the issue was whether the employer *should* have known about her off-the-clock work.The Circuit was not persuaded that the employer's "mere 'access'" to information that would have revealed the unreported work was, by itself, sufficient to impute constructive knowledge to the employer.

The court found it significant that the employer's policy prohibited unauthorized overtime work, whereas the plaintiff deliberately evaded the policy by failing both to seek authorization for the work in dispute and to report her unauthorized overtime due to the unauthorized-work prohibition.The court was also swayed by the fact that there was no evidence suggesting that the employer prevailed upon her to perform overtime work but to submit time records underreporting her worktime, particularly given the employer's express instructions *not* to do unauthorized overtime work.

The Bottom Line
Fairchild is an encouraging ruling, but employers should guard against reading it too broadly and should not assume that off-the-clock claims will be similarly resolved in their favor.For one thing, keep in mind the U.S. Labor Department's interpretative view (that courts tend to follow) expressed at 29 C.F.R. § 785.13:

"[I]t is the duty of the management to exercise its control and see that the work is not performed if it does not want it to be performed. It cannot sit back and accept the benefits without compensating for

them. The mere promulgation of a rule against such work is not enough. Management has the power to enforce the rule and must make every effort to do so."

Aside from the computer-usage records that the court addressed, there was apparently no evidence that anyone in a responsible role with All American expressly or implicitly required, encouraged, allowed, or ignored the plaintiff's unrecorded work or otherwise overlooked indications that she was performing it. The result might well have been different had there been any such additional evidence.

Employers should still take all reasonable steps to ensure that they are accurately capturing the worktime of their non-exempt employees, including by:

- Determining all the activities that count as FLSA "hours worked";
- Developing systems and policies for accurately capturing all such worktime;
- Effectively communicating those systems and policies to the employees;
- Requiring managers and supervisors to know and enforce those systems and policies; and
- Monitoring time records to evaluate whether they are accurate.

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