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## After-Hours Work: A Potential Liability Hazard

*Law360, New York (November 03, 2009)* -- You want your legal assistants to be available after hours for last-minute emergencies on the eve of trial. You want your HR screeners and interviewers to be immediately responsive to job applicants, even during their off hours. You ask your secretary to check in every evening to go over tomorrow's schedule. So what do you do?

For many lawyers and other employers, the answer has been to provide a Blackberry or other remote-access device and ask them to monitor their e-mail from outside the office.

Unfortunately, many of these employers neglect to consider exactly how to compensate these nonexempt employees for the time they spend attending to work matters while away from work. In today's climate of exploding litigation under the Fair Labor Standards Act, such an omission may be costly.

The FLSA requires an employer to count all time a nonexempt employee is required to be on duty, or that the employer permits an employee to work, whether or not required to do so, as "hours worked" for purposes of compensation and meeting the FLSA's 40-hour overtime threshold.

FLSA regulations expressly provide that even for work performed away from the job site, including at home, "If the employer knows or has reason to believe that the work is being performed, he must count the time as hours worked." 29 C.F.R. § 785.12.

The regulations provide that only truly *de minimis* amounts, seconds or a few minutes at most, may be disregarded — a standard under which courts have found that the loss of even \$1.00 per week is too much to allow the exception to apply. 29 C.F.R. § 785.47.

Courts thus appear likely to find that an employer must count all the time spent by nonexempt employees doing anything beyond the most cursory e-mail scan while working away from the office.

Reliably measuring such time, of course, is often difficult if not impossible. Certainly, employers should require their nonexempt employees accurately to record their after-hours work whenever possible — but it is not always possible.

Fortunately, the FLSA provides another potential answer when the work is intermittent and it is difficult to quantify exactly the time spent.

Under what is sometimes termed the “homeworker exception,” when an employee works at home and it is “difficult to determine the exact hours worked ... any reasonable agreement of the parties which takes into consideration all of the pertinent facts will be accepted.” 29 C.F.R. § 785.23.

This provision does not apply to situations in which an employee must be so engaged in work that he or she is largely unable to go about his or her own business (such time would be ordinary work time), or where the time worked could easily be tracked, but it may well apply to such sporadic and varying tasks as checking a Blackberry several times an evening or engaging in sporadic e-mail correspondence.

The regulations cite the quaint — but entirely applicable — example of “a telephone operator who has the switchboard in her own home.” *Id.* More recent cases have often involved canine unit police officers tasked with off-duty dog care.

As the Eighth Circuit noted in one such case, “The employer cannot easily determine how long the officers work at home caring for the dogs ... The indeterminate nature of these tasks, we think, makes them exactly the sort of work as to which it makes sense for the parties to come to an agreement, to eliminate complicated, repetitious, and hard-to-resolve disputes about exactly how much time it took to take care of the dogs each day.” *Rudolph v. Metropolitan Airports Comm’n*, 103 F.3d 677, 681 (8th Cir. 1996).

If due to the indeterminate nature of the tasks the homeworker exception applies, therefore, then as long as (1) the parties have an agreement as to the time for which an employee will be compensated, and (2) the agreement is reasonable, the parties’ agreement will be respected.

There is some authority for the idea that the “agreement” may be implied by the fact of continued employment alone, see, e.g., *Bennet v. Carl’s Towing LLC*, 2005 WL 2101002 at \*7 (W.D. Mo. Aug. 31, 2005), but the predominant view appears to be that an actual “agreement between the parties” is required, an agreement in which the terms are not unilaterally imposed by the employer, see *Leever v. City of Carson*, 360 F.3d 1014, 1018 (9th Cir. 2004) (citing *Holzapfel v. Town of Newburgh*, 145 F.3d 516, 526 (2d Cir. 1998)).

As for whether the agreement is “reasonable,” courts tend to look for a good-faith approximation of the amount of work expected to be performed, based on a careful investigation by the employer.

Thus, depending on the circumstances, it may be reasonable to agree that an employee asked to check his or her Blackberry three or so times a night and write responses as required, would receive an additional 20 minutes, or 30 minutes, or whatever the employer finds to be typical, of paid time each night.

Courts also recognize agreements that specify a reasonable good-faith limit for out-of-office work, after which additional permission from a supervisor is required.

Before asking nonexempt employees to review their e-mails and perform indeterminate amounts work from home after hours, therefore, it may make sense to enter into an agreement with the employees specifying the amount of time for which they will be compensated.

If the employer is providing the Blackberry or other equipment the employee will be using, that may provide the perfect opportunity to present the employees with a “terms of use” agreement setting forth these expectations and, to allow for the circumstance that additional work from home at times may be required well in excess of the agreement’s approximation, specifying that the employee must receive his or her supervisor’s permission before proceeding beyond the pre-set time limit.

As with all “hours worked” matters, however, an employee’s failure to abide by these requirements would subject the employee to disciplinary action — not a withholding of pay for the unauthorized time.

As the FLSA regulations state, “In all such cases it 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.” 29 C.F.R. §785.13.

Also, overtime compensation paid at one and one-half the employee’s regular rate of pay would still be required for hours worked over 40 in a work week, and state laws may impose additional requirements, such as daily overtime, that may be triggered by after-hours work.

Technology increasingly has created the expectation that even lower-level employees will be available at the touch of a few buttons, whatever the time of day or night.

The FLSA was designed with a different world and a different workplace in mind. But even the drafters of the FLSA regulations envisioned some of the special problems that doing work away from the job site could entail.

A final caution, though: due to their fact-specific nature, and the varying laws of different state and local jurisdictions, no employer should implement a homemaker agreement without seeking counsel from an attorney experienced in wage-and-hour matters.

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