



When Does Off-Duty Use of Smartphones Result in Compensable Overtime?

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As you may already know, the U.S. Department of Labor's ("DOL") salary requirements for the white-collar exemptions under the Fair Labor Standard Act ("FLSA") will be revised in 2016, making millions of additional employees eligible for overtime protection. However, there is another issue lurking in the shadows, which is whether non-exempt employees who use their smartphones after regular work hours must be paid overtime.

As smartphones and other personal electronic devices become more common, the issue of employees using electronic devices after work hours has become a serious problem for employers. Take, for example, the class action case of *Allen v City of Chicago*, which was decided in December 2015 after nearly six years of litigation.

In the *Allen* case, a police officer sued the City of Chicago for unpaid overtime related to the off-the-clock usage of his smartphone (a BlackBerry). According to the officer, the police department issued electronic devices and required police officers to respond to work-related emails, text messages and voicemails while off duty. Although the City had a policy in place to pay overtime for the officers who worked on their smartphones after work, the officers claimed there was an unwritten policy, or uniform culture or belief, that it was not acceptable for officers to turn in time slips for off-duty work performed on their smartphones.

In analyzing the potential liability for overtime, the court first addressed the issue of whether the activities pursued by the police officers on the smartphones constituted compensable "work" under the FLSA. The court held that, to be compensable under the FLSA, the work must involve "substantial" duties pursued necessarily and primarily as part of a person's job. Activities that fall below that "murky" standard – "de minimus activities" – don't require compensation.

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The court determined that some, but not all, of the activities performed by the officers on their smartphones after regular work hours were compensable. What constitutes de minimus (non-compensable) work is not well-defined. However, the court did provide some guidance. According to the court, the mere act of monitoring smartphones did not constitute an activity compensable under the FLSA, so long as the plaintiffs could still spend their off-duty time primarily for their own benefit without persistent interruptions. The court, citing a case from the Sixth Circuit Court of Appeals (which covers Michigan), also noted that an employer's requirement that employees carry a radio and respond if necessary did not result in compensatory time under the FLSA, unless monitoring the radio prevented an employee from using the free time for the employee's own benefit. However, activities such as immediately responding to witness tips or emergency situations, did constitute compensable work.

Despite finding that some activities by the officers were compensable work, the *Allen* court nevertheless dismissed the case. Again, citing decisions from the Sixth Circuit, the court held that under the FLSA, if an employer establishes a reasonable process for an employee to report uncompensated work time, the employer is not liable for non-payment if the employee fails to follow the established process. However, having such a process in place will not necessarily shield an employer from liability if employees can show an unwritten policy to deny overtime compensation. Since the court held that the police officers failed to prove that the city knew or had reason to know that the officers were not receiving compensation for any particular period of overtime the officers may have worked, it dismissed the case. The officers intend to appeal.

The DOL will likely implement new rules related to non-exempt employees' use of smartphone and other electronic devices outside of normal work hours. In the interim, employers should take proactive steps toward complying with the impending rules concerning white-collar exemptions and to guard against overtime liability for non-exempt employee use of smartphones outside of work. With respect to the latter, employers should update or implement policies addressing the issue. Two types of policies are needed:

- A wage and hour policy that must say that if employees perform work that is not recorded in the usual way, there is a procedure by which they can report and be paid. The established procedure must be reasonable.
- A personal electronic device policy that clearly states when employees may and may not use smartphones or other electronic devices. This policy must inform employees that, in the event they use devices for work purposes that are not minimal outside their normal work hours, they must report the time using the procedures set forth in the wage and hour policy.

If you have any questions or need help with revising or implementing policies to comply with the FLSA, or any other labor and employment matter, please contact Mike Blum at mblum@fosterswift.com or 248.785.4722.