

Cell Phone Use After Hours Could Require Overtime Compensation

A Potential Liability for Employers: Part 2 in a Three Part Series

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With smart phones integrated into the lives of so many throughout waking hours, employers are increasingly faced with the challenge of ensuring their employees are properly compensated. With usage so widespread, it has become commonplace for employees from nearly every part of industry to respond to work calls, texts or emails beyond their prescribed office or work shift. In the first part of the three part series, [Distracted Driving-A Potential Liability for Employers](#), we examined the risks for employers associated with distracted driving caused by employees' use of cell phones. In this post, we examine the overtime aspects associated with the use of cell phones after hours for work purposes, the current federal mandates, penalties in New Jersey and the employer's obligation.

Federal Directive for Overtime Pay

The U.S. Department of Labor's Fair Labor Standards Act establishes federal overtime provisions for overtime pay. The Fair Labor Standards Act states, "unless exempt, employees covered by the Act must receive overtime pay for hours worked over 40 in a work week at a rate not less than time and one-half their regular rates of pay." [1] Tasks that occur outside of an employee's set waged hours may include responding to work-related telephone calls and emails. Recently, in [Walter Savinovich vs. Evolution Fresh, Inc., et al](#) (2019), Starbucks Corporation and its subsidiary, Evolution Fresh, settled a class action suit for failing to pay delivery drivers for time spent taking company calls outside of their regular work hours. [2]

In recording working time under the Fair Labor Standards Act, infrequent and insignificant periods of time beyond the scheduled working hours, which cannot as a practical matter be precisely recorded for payroll purposes, may be disregarded. Courts have held that such periods of time are de minimis (insignificant). Courts will generally analyze three factors to determine whether time worked should be considered de minimis and not compensable: (1) the administrative difficulty in recording the time, (2) the aggregate amount of time worked without compensation, and (3) whether the work is of a type performed on a regular basis. This rule applies only where there are uncertain and indefinite periods of time involved, a few seconds or minutes in duration, and where the failure to count such time is justified by industrial realities. An employer may not arbitrarily fail to count any part, however small, of working time that can be practically ascertained.

Even work that is not requested by an employer is compensable if the employer knows about the work or should have known that the work was being done "work not requested but suffered or permitted is work time." 29 C.F.R. 785.11.

Financial Penalties for Employers in New Jersey

In recent years, New Jersey passed one of the strictest [Wage Theft Laws](#), including increasing the statute of limitations from two to six years. In addition to the unpaid/lost wages, the employee can obtain liquidated damages equal to 200 percent of the unpaid wages, plus reasonable costs of the action and attorney's fees. [3]

Read more about New Jersey's Wage Theft Law [in our 2019 post concerning its passage](#).

Employer's Obligation

It is the employer's responsibility to ensure that employees are compensated for the after hour use of cell

phones for the benefit of the employer. Employers should (1) structure work so that employees do not perform tasks before or after regular hours, (2) use time tracking tools to record the daily and weekly work hours of each employee, and (3) assess the time it takes employees to perform duties and compensate accordingly.

TAKEAWAY: Employers should establish and enforce clear, written policies regarding employees' use of cell phones for work after hours to minimize risk of under compensation.

If you are an employer with questions regarding employees' use of cell phones, contact [Tracy Armstrong](#) or another member of the [Wilentz Employment Law Team](#).

Resources:

[1] [Wages and the Fair Labor Standards Act](#)

[2] [Walter Savinovich vs. Evolution Fresh, Inc., et al.](#)

[3] [New Jersey Passes One of Nation's Strongest Wage Theft Laws](#)

See also:

[That 1 A.M. Cell Phone Call to a Worker May Require Overtime Pay \(1\)](#)

[Are Your Employees Texting? The Risks To Employers In Taking Workplace Communications Offline](#)

[What do Smartphones have to do with Overtime Liability Considerations?](#)

[Why Time Tracking is Important for You & Your Organization](#)

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