

# Working-Off-The-Clock: Minimizing Wage and Hour Exposure from Digital Devices and Working at Home

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## LIVING IN THE “I WANT IT NOW” TECHNOLOGY ERA

Smart phones and tablets are extremely handy. No question they can increase an employee’s productivity. BUT if your non-exempt employees are using them after work hours, you could be facing legal consequences.

The Chicago Police Department issued company-provided cell phones. As with other employers in the “I want it NOW” era, management saw this as a way to boost employee productivity by being able to check their e-mail, voice mail and text messages remotely. Good idea in theory. BUT officers used their devices for work-related tasks after their shifts had ended.

RESULT? A Sgt. Filed a Fair Labor Standards Act collective action against the Police Department claiming that the department willfully violated the statute by intentionally failing and refusing to pay plaintiff and the collective all compensation due under the FLSA. Put simply, the officers wanted overtime for the work they did after hours on their employer-provided smart phones.

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## FAIR LABOR STANDARDS ACT (FLSA) BASICS

- FLSA is the Federal law which sets minimum wage, overtime, equal pay, recordkeeping, and youth employment standards
- The FLSA requires that all non-exempt employees in the United States be paid at least the federal minimum wage for all hours worked and overtime pay at time and one-and-one-half the regular rate of pay for all hours worked over 40 hours in a workweek
  - *Note:* Public-Sector employers can offer compensatory time off in lieu of overtime

*\*Reminder: Always check to see if any applicable state or local law provides more generous employee rights than the FLSA*

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## “HOURS WORKED” GENERALLY

- “Hours worked” has been generally understood to include:
  - Time an employee must be on duty, on the employer’s premises or at any other prescribed place of work; and
  - Any additional time the employee is **allowed** (i.e., **suffered** or **permitted**) to work (even if not requested by the employer)

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## “OFF THE CLOCK WORK” GENERAL RULE

- Whether an employer must compensate employees for work performed outside of regular working hours and outside of the office (hereafter “off the clock” work) is a very fact intensive inquiry
- However, the case law generally requires an employer pay an employee for time “off the clock” if:
  1. The employee performed “work”;
  2. For more than a *de minimis* amount of time; and
  3. The employer knew or had reason to know about the work

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## “WORK” ACTUALLY PERFORMED

- Employees are only entitled to compensation under the FLSA for “work”
- The FLSA does not define “work,” but Supreme Court has held that “work” under the FLSA means “physical or mental exertion (whether burdensome or not) controlled or required by the employer and *pursued necessarily and primarily for the benefit of the employer and his business*”
- The “necessarily and primarily” aspect is the most litigated as the “exertion” aspect is easily satisfied (e.g., a security guard watching monitors requires mental exertion)
- Time spent waiting to work is, at times, considered working time under the FLSA where the employee is “engaged to wait” or is “waiting to be engaged”

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## TWO EXCEPTIONS FROM FLSA COVERAGE TO NOTE

- Two activities are explicitly excepted from coverage under the FLSA:
  - Time spent by an employee “walking, riding, or traveling to and from the actual place of performance of the **principal activity or activities**” of the employee, unless such activities are paid for in accordance with a contract, custom or practice; and
  - Time spent on activities that are performed before or after the employee’s **principal work activities**, unless such activities are paid for pursuant to a contract, or custom or practice
- Supreme Court has held “principal activity” means “all activities which are an integral and indispensable part of the principal activities”

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## MORE THAN A *DE MINIMIS* AMOUNT OF TIME

- Insubstantial or insignificant periods of time working outside scheduled hours may be disregarded
- This means only a few seconds or minutes of work; 10 minutes is not *de minimus*
- Also, an employer may not arbitrarily disregard, or round down, work time
- US Court of Appeals for the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 6<sup>th</sup>, and 9<sup>th</sup> Circuits have adopted the *Lindow* factors
  - Practical difficulty the employer would encounter in recording additional time
  - Total amount of compensable time
  - Regularity of the additional work

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## EMPLOYER KNEW OR HAD REASON TO KNOW

- Employers (through their managers) who know or have reason to know of off-the-clock work must compensate the employee for the time spent
  - Employer cannot avoid liability by deliberately disregarding indications employees are working off the clock
- Common sense standard, which is met under myriad of circumstances:
  - Employer's high performance expectations unattainable during regular work hours
  - Employer accepts "off-the-clock" work (e.g., a report e-mailed after hours)

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## EMPLOYER POLICIES FOR REPORTING OVERTIME

- Some Federal Circuit Courts recognize an affirmative defense to the 3<sup>rd</sup> element where an employer establishes a reasonable process for an employee to report uncompensated work time the employer and the employee fails to follow the established process
  - US Court of Appeals for the 2<sup>nd</sup>, 6<sup>th</sup>, 8<sup>th</sup> and 10<sup>th</sup> Circuits have expressly adopted the defense
- However, the defense is inapplicable if the employer:
  - Has an unwritten practice or policy of discouraging reporting off-the-clock and/or overtime hours;
  - Prevented the employees from reporting overtime; or
  - Was notified of the employee's unreported work

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## NONEXEMPT EMPLOYEE WORK FROM HOME HYPO

Eastern Airlines recently decided to allow its customer service representatives (paid a \$21,000/yr salary) to work from home by forwarding customer calls to the employees' landline or cell phone and providing them an Eastern laptop. In the past, Eastern strictly enforced its no overtime policy by locking representatives out of their computers and disabling their phones at the end of their shifts; re-activating them at the start of their shifts the next workday. Additionally, Eastern would require employees to go to the lunchroom to take their 30-minute unpaid lunch. Stacy, an Eastern representative, decided to take advantage of the work from home offering. Stacy was scheduled to work from 8:30 AM-5:00 PM Monday-Friday. Over the next few weeks Stacy worked her normal schedule, but at least three times a week Stacy would have to work through lunch (Stacy would mute her phone and take bites of her lunch while the customer spoke) due to heavy call volume. During that same time, Eastern locked Stacy out of the network and stopped forwarding calls to her at the end of her shift.

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## NONEXEMPT EMPLOYEE WORK FROM HOME HYPO

Does Eastern owe Stacy overtime pay when she worked from home?

- A. No, because Stacy was a salaried employee
- B. No, because Eastern enforced its no overtime policy by only allowing Stacy to receive customer calls and e-mails during her regularly scheduled work hours
- C. Yes, because Stacy worked through lunch

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## EXEMPT EMPLOYEE ON FMLA LEAVE HYPO

Eastern Airlines has over 1,000 employees in its Detroit, MI office, including its Director of Governmental Compliance, Ron (paid \$95,000/yr salary). Eastern has an unpaid paternity leave policy (aka- FMLA) requiring any paid leave be used before using unpaid paternity leave. Ron's wife recently gave birth to triplets, which required Ron to take 10 weeks of leave. Ron used all of his paid leave to cover the first five (5) weeks and then used unpaid paternity to cover the rest. While on unpaid leave, Ron received numerous calls (roughly 40 minutes/day) from Eastern Airlines officials asking how to adjust to a new batch of Environmental Protection Agency regulations.

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## EXEMPT EMPLOYEE ON FMLA LEAVE HYPO

Is Eastern liable for its actions during Ron's unpaid leave?

- A. No, because Ron is an FLSA exempt employee
- B. Yes, because Ron was not paid for work (e.g., 40 minute phone calls) performed while on unpaid paternity leave
- C. Maybe, depending on the particular facts of the phone call

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## CABLE INSTALLER MOBILE WORKCENTER HYPO

Lightning Cablesystems employs a number of cable installers (paid \$18/hr), whom Lightning provides with all the necessary cable equipment and supplies. To save time and money, Lightning regularly delivers new equipment and supplies to the installers home and each installer is provided a portable work tablet with a cellular data access (paid for by Lightning). The tablets are used to provide the installers with up-to-date work assignments and other information from Lightning HQ. Lightning pays installers from the moment they arrive at their first assignment until the end of their last assignment; installers are required to use their tablets to check-in at the start of an assignment and check-out at the end of the assignment. Lightning also places installers on-call when not working with the expectation the installers respond to a page to their work tablet within ten minutes and then report to work within thirty minutes after they respond. In such instances, Lightning pays installers from the time they respond to the page until the pertinent assignment is completed. When on call, installers are free to do whatever they want, wherever they want, but may not drink alcohol or travel more than thirty miles away from their homes.

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## CABLE INSTALLER MOBILE WORKCENTER HYPO

Does Lightning owe the installers wages for time spent on their tablets before work?

- A. Yes, because the installers are mentally exerting themselves primarily for the benefit of the employer
- B. No, because the activity is not an integral and indispensable part of a principal activity

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## CABLE INSTALLER MOBILE WORKCENTER HYPO

Does Lightning owe the installers wages for time spent on call?

- A. Yes, because while on call the installers were prohibited from drinking alcohol and restricted in how far they could go away from their homes
- B. No, because the installers could do anything they normally did so long as they were able to respond to a call promptly and sober

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## NARCOTICS OFFICERS CELL PHONE HYPO

Gotham City Police Department has a special squad of narcotics officers (nonexempt under the FLSA) whom Gotham supplies with BlackBerry smartphones. The officers are expected to use the phones to immediately respond to confidential informants, gather information on investigations that were heating up, and respond to aid in unannounced drug busts. As a result, the officers must always be monitoring their phones except for one day a week. The Police Department is currently unable to efficiently track all the time officers use their phones during off hours. In an attempt to avoid FLSA liability, the Department has an off-the-clock time reporting policy and procedure, which requires the officers to “report the estimated amount of time an officer felt they worked off-the-clock rounded up to the nearest quarter hour.” Three years after the Police Department issued the policy, the officers brought an FLSA collective class action for unpaid wages and overtime.

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## NARCOTICS OFFICERS CELL PHONE HYPO

Ignoring ultimate liability, was the officers time compensable when they responded to confidential informants when off-the-clock?

- A. Yes, because the officers were expected to reply immediately to people with information necessary for the officers to perform their jobs
- B. No, because the calls were probably mostly *de minimis* in time
- C. Maybe, depending on aggregate amount of time spent on the calls as the calls were clearly “work”

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## SALESMAN CLIENT EMAILS HYPO

Jumbo Insurance Company employed 5,000 salesman (paid \$25/hr, plus commission) who would go door-to-door trying to sell life insurance. Jumbo provided each salesman with an iPhone 7s to use for sales calls. Jumbo had a strict policy of prohibiting managerial staff from contacting salesman outside of the salesman scheduled working hours. Paul, a Jumbo salesman, loved his job so he would constantly be e-mailing potential sales leads and responding to those leads, even outside of his scheduled working hours (at least 1 hour a day). Paul never told his manager about his off-the-clock work nor did he try to get paid for the time.

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## SALESMAN CLIENT EMAILS HYPO

Does Jumbo owe Paul for his off-the-clock client e-mails and calls even though he never reported his actions to Jumbo?

- A. No, because Jumbo (via its managers) did not know nor had reason to know of Paul's off-the-clock work since he never told them about it
- B. Yes, because Jumbo had access to Paul's cell phone records
- C. Maybe, depending on further factual inquiry

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## **VIOLATION OF AFTER HOURS EMAIL POLICY HYPO**

Looking at the prior Jumbo hypo, assume now Jumbo implements a strict no use of iPhone outside of scheduled working hours policy. Jumbo's policy states any salesman who violates the policy faces severe discipline (including termination). Jumbo also now is able to get monthly reports from Alltel Wireless (cell phone carrier) detailing salesman use of their iPhones, including the time e-mails were sent. Paul (from the prior hypo) wrongly assumes he can get around the new policy by only e-mailing clients since his old BlackBerry cell phone bills only listed the amount of data used for the prior month.

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## VIOLATION OF AFTER HOURS EMAIL POLICY HYPO

Does Jumbo owe Paul for his off-the-clock client e-mails even though its new policy threatens discipline?

- A. No, because Jumbo cannot be held liable for work expressly forbid and planned to punish
- B. Yes, because Jumbo allowed the work to occur, though Jumbo can still discipline Paul for violations

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## ADVICE TO GIVE CLIENTS

- Employers must pay nonexempt employees for all hours worked, even unauthorized overtime
- Employers should define standards about when and under what conditions work is permitted away from the workplace
  - For example, are employees permitted to remotely access the computer system? Are employees permitted to check e-mails at night?
- Employers should ensure that nonexempt employees accurately and completely record all hours worked
- Employers may (and should) discipline employees for unauthorized working time
- Be mindful of Employee use of smartphones and other technology from home and outside scheduled work hours

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## QUESTIONS?



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# THANK YOU

Legal Disclaimer: This document is not intended to give legal advice. It is comprised of general information. Employers facing specific issues should seek the assistance of an attorney.

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