

WEDNESDAY, JULY 5, 2017

PERSPECTIVE

## Are you minding potential off-the-clock work problems?

By Matthew Schechter

California's Labor Code defines "wages" as amounts for work "performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculation." Labor Code Section 200(a). When focusing on employees who work on an hourly basis, calculating the time worked, and thus wages owed, is fairly straightforward for the time during which the employee is "clocked-in." Knowing the hours worked and what pay is due is simple in those circumstances.

However, problems can quickly arise when someone works "off-the-clock," given that such time is neither compensated, nor counted towards an employee's weekly hours for overtime purposes. Because the employee should be paid for such work, this can open an employer up to labor commissioner claims and lawsuits. Thus, it is important to be aware of common situations where off-the-clock work can take place, what factors will be considered in determining if compensation is warranted for such work, and what steps to take to try and limit or prevent such work from occurring the first place.

The first, and most obvious, example of off-the-clock work is work done remotely or from home. This can include, but is not limited to, reading and sending emails or texts, taking or making phone calls, or reviewing documents. This type of work is clearly compensable, but one can run into difficulties when trying to record or document the amount of time actually spent on such work, particularly if it is a day or two (or more) after the fact.

Another common off-the-clock situation is travel time. Typically, time spent going to and from home and work is not compensable. However, if one is required to use a company car, and one cannot run a personal errand or engage in personal activities when in the car, then such travel time may be deemed "hours worked." Similarly, driving from one job site to another,

regardless of what type of car is used, is going to be compensable time.

A third example, but one where we start to see less of a bright line rule, is pre- and post-shift activity. Some pre- and post-work activity — such as changing clothes, waiting in a security line, or mapping routes — may not be deemed hours worked and thus no compensation is required. On the

Problems can quickly arise when someone works 'off-the-clock,' given that such time is neither compensated, nor counted towards an employee's weekly hours for overtime purposes.

other hand, work such as loading trucks, finishing paperwork at the office after you've already punched out, or helping to set up a restaurant before the start of one's shift will likely be deemed compensable work.

Because there is no bright line delineating what activities are, or are not, compensable off-the-clock work, it is the particular facts of each case that will determine if wages are due. To assist in focusing in on the relevant facts, courts typically turn to three key questions: (1) Is the work integral or necessary to the performance of the job or required by the employer? (2) Does the employee have control over when and where these activities are done? and (3) Is the time spent de minimus? As to the first two questions, employees will need to be paid if the work is integral to the business or when the employer controls when and where the work must be done. However, when the time spent is de minimus, even if the work is normally compensable, that potentially can act as a defense to wage claims brought by employees.

Whether the de minimus doctrine can definitively serve as a defense to wage claims under California's Labor Code Sections 510, 1194 and 1197, though, will soon be considered by the California Supreme Court. In *Troester v. Starbucks Corp.*, the district court granted summary judgment for Starbucks, finding that the de minimus defense applied to plaintiff's

state based wage claims for he spent closing the store after clocking out (which included, for example, logging out of the computer system, activating the alarm, locking the store, and walking employees to their cars). After plaintiff appealed, the 9th U.S. Circuit Court of Appeals certified the question regarding application of the doctrine to claims for unpaid wages

any such complaints, and permitting only certain personnel to make edits to time already entered. Having a time card certification requirement, by which the employee reaffirms each pay period that all work done is recorded, that the employer has a policy against off-the-clock work, and that the time card is accurate, can also be useful.

Indeed, the importance of a written policy, and having employees sign documentation indicating their understanding of the policy can be seen in a 2014 appellate decision, *Jong v. Kaiser Foundation Health Plan, Inc.*, 226 Cal. App. 4th 391 (2014, 1st Dist., Div. 3). There, the court not only held that a plaintiff seeking to recover for off-the-clock work must set forth evidence demonstrating that the employer had actual or constructive knowledge of the work, but it also rejected plaintiff's evidence of the employer's alleged knowledge of off-the-clock work based on the plaintiff's knowledge of the employer's time keeping policy and his signature on a form attesting that he would not work off the clock.

Given the ubiquitous nature of cell-phones, tablets, and remote access; people commuting in greater distances; and being accessible to employers by cellphone, the potential for off-the-work claims is ever increasing. Being aware of potential problems, having a policy in place, and paying employees engaged in off-the-clock work, will help to keep you from getting caught off guard.

**Matthew Schechter** is a partner based in the San Jose office of *McManis Faulkner*.



SCHECHTER

under California's Labor Code, and the Supreme Court accepted. The case (S234969) has been fully briefed, but oral argument has not yet been scheduled.

A fourth, and final, example involves on-call, or stand-by, time. Like pre and post-work activity, whether on-call time must be compensated is also fact dependent. Here, a court will consider, for example, how close the employee needs to stay to the work site and how many calls are typically received while on-call. In essence, the court is looking for the amount of control the employer has over the employee during on-call time. Thus, in *Mendiola v. CPS Security Solutions, Inc.*, 60 Cal. 4th 833 (2015), the Supreme Court held that, because the on-call guards at issue, among other things, had to be onsite, immediately respond in uniform if contacted by a dispatcher, and could not easily trade responsibilities, they were under significant control of the employer such as to be paid for the time spent on-call.

What can an employer do to address off-the-clock work? One of the most important steps is to have an off-the-clock work policy as part of one's employee handbook, as well as part of any employee training. Key aspects of any policy should include requiring accurate reporting of hours worked, barring falsification of time worked, encouraging employees to report violations of the policy, having a clear method for making and documenting