



FLSA Legal Insider

Hope for Employers Defending Off-the-Clock Work Claims

By Louisa Johnson, Esq.



Louisa Johnson, Esq., is a senior associate in the Wage & Hour Litigation Practice Group at Seyfarth Shaw LLP's Atlanta office. She devotes the majority of her practice to representing employers in both single-plaintiff and complex federal and state wage and hour litigation, and to conducting preventative

workplace assessments of employers' pay practices and employee classifications to ensure compliance with the Fair Labor Standards Act and state wage and hour laws.

A recent federal court decision gives hope to employers facing "off the clock" lawsuits brought under the Fair Labor Standards Act even though they make good-faith efforts to comply with the law. In the ruling, a federal court found that the plaintiff had worked no off-the-clock time for which the employer owed him compensation (*Kuebel v. Black & Decker (U.S.) Inc.*, No. 08-CV-6020T, 2010 WL 1930659 (W.D.N.Y. May 12, 2010)).

'Off the Clock' Claims

In off-the-clock lawsuits, employees claim they are owed back pay for work they purportedly performed pre-shift, post-shift or during meal breaks without compensation (see Tab 400 of the *Handbook*).

These employees often advance one or more of the following reasons for their off-the-clock work:

(1) They knew company policy required them to record all hours worked. They did not, however, record time spent on preliminary and postliminary (post-shift) activities that were essential precursors to their main job functions (such as booting up and logging on to their computers, logging off and shutting down their computers, or donning and doffing protective clothing and equipment), because they were not explicitly told to include such activities on their timesheets.

(2) Their direct supervisors or managers were incentivized through commissions, bonuses or career progression opportunities to keep the number of labor hours used by the employees in their departments or divisions as low as possible. As a result, the supervisors or managers told the employees to clock out at shift end time but did not follow up that directive with an explicit instruction to stop work and go home. Therefore, the employees clocked out but continued to work.

(3) They knew company policy required them to take daily lunch breaks and to receive pre-approval for any overtime hours, but they did not believe they could get all of their work done during regular shift hours. Because they did not want to be disciplined for violating company policy by working through their lunch breaks, they did not report the work performed during their lunch breaks but instead represented on their timesheets that they took the daily lunch breaks.

Whatever the purported reason for the off-the-clock work, the employees' attorneys typically argue that the employer should be found liable for the unrecorded hours even if the employees intentionally underreported their work hours. They assert that the court should presume that the employer knew or should have known about the off-the-clock work, even if the employees performed the work where a supervisor or manager could not monitor them. They contend that if the employees have alleged that their timesheets are inaccurate and unreliable and have provided a rough estimate of the average number of off-the-clock hours per week, then the employer should be found liable even if the only "proof" the employees have of their purported off-the-clock work is their own self-serving testimony.

Effect of Different Standards of Proof

When courts apply such a low standard of proof for employees, an adverse ruling becomes virtually inescap-

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able unless the employer can produce records (other than the employees' allegedly inaccurate timesheets) that can be used to measure the employees' work hours and refute the employees' claims as to the fact and amount of off-the-clock work (see Tab 800 of the *Handbook*).

Some courts have applied this low standard of proof to employees' claims, regardless of the circumstances of the case, because they are concerned that a higher standard of proof would allow employers to short-change employees of their hard-earned wages.

A few courts, however, have refused to apply the low standard of proof to all employees because they understand that it is not fair in some circumstances to assume that the employer is a wrongdoer and to strap the company with the burden of disproving plaintiff-employees' self-serving allegations. These courts recognize that when the balance is allowed to tip too far in the employees' favor, an employer that has made every effort to accurately record and pay for employees' time could be

found liable to employees for work that they may never have performed.

The Kuebel Case

While it is not the first decision of its kind, the *Kuebel* decision is a recent example of a case in which a court tried to strike a better balance (see August 2010 newsletter, p. 3).

In *Kuebel*, the plaintiff-employee was a retail specialist who was responsible for product merchandising and marketing within Home Depot stores. He sued his employer, Black & Decker, claiming that, while he always worked in excess of 40 hours per week, he recorded only 40 hours of work. The employee claimed that his supervisors knew or should have known about his off-the-clock work.

The plaintiff offered several reasons for the off-the-clock work. He claimed, for instance, that his supervisors told him not to work more than eight hours per day, although he could not complete all of his work within eight hours. He also claimed that his supervisors were pressured to minimize overtime work performed by

See *Off the Clock*, p. 3

Best Practices for Employers to Prevent 'Off the Clock' Lawsuits

While there are no guarantees as to what a particular court will do, and while a particular employer's circumstances may make different timekeeping practices advisable, the following best practices are extremely helpful to most employers in ensuring accurate time records and, if necessary, in defending off-the-clock work claims:

- State clearly in easily accessible company policies that employees should accurately record all hours worked, that off-the-clock work is prohibited and that failure to accurately record working time is grounds for discipline and/or employment termination.
- Regularly remind both nonexempt employees and their supervisors of company policies requiring accurate time-recording and prohibiting off-the-clock work.
- Allow time within the employees' scheduled work hours for those preliminary and postliminary activities that are essential to the employees' performance of their main job duties.
- Consider methods for compensating and promoting supervisors that do not directly reward them based on the total labor hours or the number of overtime hours that their teams or divisions use.
- Create a hotline or web-based reporting system through which nonexempt employees can notify management if they believe that their supervisors are violating company policies that prohibit off-the-clock work or require the accurate recording of all work time.
- If the employees' supervisors are able to directly monitor the employees during the work day, train the supervisors to review employee timesheets for accuracy and to strictly enforce the company's timekeeping policies.
- Have employees record their actual start and stop time for the day and for their lunch break, rather than simply reporting the total hours worked.
- Periodically audit time records to ensure that the company's timekeeping policies are being followed.

The goal of these suggested practices is to ensure that all employee working time is accurately recorded and properly paid. Keep in mind that a company's situation may cause additional, or different, practices to be necessary. 🏠

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him and other retail specialists. Finally, he asserted that his supervisors knew or should have known about his off-the-clock work even though they were rarely in the Home Depot stores with him.

In its defense, Black & Decker produced evidence to establish that it had written policies stating that all time worked must be accurately recorded and compensated, that the employee had been trained on these policies and that it was up to him to accurately self-report his hours because he worked alone and unsupervised most days.

Black & Decker also produced evidence of a complaint process through which the plaintiff-employee could have brought to management's attention his contention that his supervisors were requiring him to work off the clock or knew that his time records and/or pay were wrong. Yet there were no records of any such complaints by the plaintiff-employee or by anyone else (even anonymously) against any of the plaintiff's supervisors.

The employee's supervisors testified that they were not pressured to minimize overtime; that they were not disciplined or counseled when retail specialists, like the plaintiff, recorded overtime hours; and that they did not discipline the plaintiff or other retail specialists for recording overtime hours.

The company also produced evidence that it paid a substantial amount of overtime compensation to retail specialists each year and that it had paid the plaintiff for overtime work on the one occasion that he reported working more than 40 hours in a week.

Black & Decker also showed that the plaintiff-employee was repeatedly counseled for poor job performance that was evidently caused, in part, by his failure to spend enough time in his assigned Home Depot stores to adequately attend to the displays and to be familiar with the stores' layouts. In fact, these performance problems were the reason that the plaintiff's employment was ultimately terminated. In addition, the employee admitted that he had lied to his supervisor about taking a training course one day and that he falsified his time records to reflect that he had done the training.

Considering all of this evidence, the court ruled in favor of Black & Decker, holding that the plaintiff was not owed compensation for any off-the-clock work. In reaching this conclusion, the court interpreted decisions by other courts placing different degrees of burden on an employee to prove his or her case and on an employer to disprove the employee's claims.

Two Tests to Determine Liability

Of particular interest is the court's discussion and ruling that one of two different tests should be used, depending on the circumstances of a particular case, for determining liability. One test should apply when the employer maintains control over the calculation of the employee's compensable time and either alters or fails to keep the employee's time records. In these circumstances, the court found, employees should be held to a low burden of proof because an employer's failure to keep accurate records places them at a disadvantage in proving their claims. Employees should therefore be allowed to prove their claims by producing sufficient evidence, in the form of testimony alone, from which the amount and extent of off-the-clock work could be inferred.

An entirely different test, however, should apply, placing a higher burden of proof on the employee, when the employee is in charge of accurately self-reporting his work hours, has voluntarily chosen to submit inaccurate time records, or fails to notify the employer of inaccuracies in such time records before suing the employer. In other words, in circumstances like those in the *Kuebel* case, the employee is subject to a higher burden of proof that cannot be met with self-serving, vague testimony as to the amount of off-the-clock work and the employer's alleged knowledge of that work. Instead, the employee must prove with specificity, based on reliable, objective evidence, when and for how long he performed the off-the-clock work for which he is seeking compensation.

The *Kuebel* ruling is good news for employers because it creates a roadmap for them to follow in maximizing the chance that a court will apply the higher standard of proof to off-the-clock claims when the purported failure to pay for all hours worked may not be the employer's fault. 🏠



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