A Matter of Time: Managing Wage and Hour Risks in a Digitally Connected World

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This paper is scheduled to be published in the June 2017 edition of the Journal of Internet Law, produced by Aspen Publishing.

The authors would like to thank Jackson Lewis Associate, Roberto Concepcion, for his assistance with the preparation of this paper.
I. Introduction

Many people are addicted to their phones. They check them constantly throughout the day (sometimes every few minutes) to determine whether a new e-mail or text message has been sent or a new item posted on Facebook, Instagram, Snapchat, and the myriad other social media applications that exist. To ensure immediate notification of incoming mail, users can also set their phone to provide an audio notification when a new e-mail, voicemail, or text message has arrived, and select from hundreds of tones to announce the message—whether a “chime,” “ding,” or “swoosh.”

But some of those addicts checking their phones are employees, and they are checking their phones for work related e-mail and messages. And employees who have access to e-mail on their smartphones or access to employer computer systems and servers through the internet can work and communicate with coworkers or managers anytime.

While the ability to communicate with co-workers and managers existed before the internet age—through home phones and pay phones (now a collector’s item)—receiving a telephone call from a co-worker or manager on the weekend or after regular work hours was more an exception in most workplaces, rather than the rule. But due to the ease of communicating via e-mail or text message, many managers and coworkers no longer feel constrained in the same way as when land-line phones ruled the world, and regularly e-mail and text employees after the regular workday has ended. And employees (particularly those addicted to phones) feel compelled to read and respond to these communications, whether at work or not—and their managers may expect them to respond.

Some countries have found the problem so severe that they have enacted laws regulating the sending of e-mail after work hours. This year, for example, France enacted a “right to disconnect” law, requiring companies with more than 50 workers to negotiate with employees and unions on e-mail use after work hours.

This paper highlights the various ways in which the increased use of technology in the workforce has increased the risk of violations of wage and hour laws and outlines steps employers can take to manage those risks. Many of these risks relate to non-exempt employees, who are eligible for minimum wage and overtime, but technology also has made compliance with wage and hour laws as applied to exempt employees more challenging.

We start with an issue at the core of most questions involving the intersection of technology and wage and hour compliance—defining what constitutes “work.”
II. **What is “Work”?**

Must an employer compensate employees for every minute they spend outside of the regular work day reading or responding to work e-mail, logging on to a company computer server to upload documents and information obtained during the course of the day or logging on to obtain work assignments for the following day? Maybe.

The answer to these questions goes to the very heart of what constitutes “work.” Under the Fair Labor Standards Act (“FLSA”), 29 U.S.C. § 201 et seq., employers are required to pay all covered employees the minimum wage for all hours worked and overtime at one and one-half times their regular rate of pay for hours worked over forty in a workweek. The FLSA defines “employ” as including “to suffer or permit to work.” 29 U.S.C. § 203(g). But the FLSA does not contain any definition of “work” or “workweek.” *Integrity Staffing v. Busk*, 135 S. Ct. 513 (2014); *IBP, Inc. v. Alvarez*, 546 U.S. 21, 26 (2005); see also *Reich v. New York City Transit Auth.*, 45 F.3d 646, 649 (2d Cir. 1995) (“While Congress made clear that employers are required to compensate employees for ‘work’ . . . it did not define the contours of . . . ‘work’”); 29 C.F.R. § 785.6. The FLSA also requires employers to keep records of the hours worked by their employees. 29 C.F.R. § 516.

**A. Early Cases**

Early Supreme Court cases interpreted the term work broadly, defining work as any “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.” *Busk*, 135 S. Ct. at 516 (quoting *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590 (1944)). The Supreme Court later explained that work can also include activities even where no exertion is required, and that the workweek includes all the time during which an employee is necessarily required to be on the employer’s premises, on duty or at a prescribed place. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946); 29 C.F.R. § 785.7.

These broad definitions of “work,” however, created substantial unexpected liability for activity that had been regarded as non-compensable (e.g., walking to and from the time clock from the actual physical place of work). Following the Supreme Court’s decision in *Anderson*, for example, more than 1,500 lawsuits under the FLSA were filed seeking compensation for time spent walking to and from the actual place of work, seeking nearly $6 billion in damages. *Busk*, 135 S. Ct. at 516.

**B. Portal-to-Portal Act**

In reaction to these opinions, Congress passed the Portal-to-Portal Act in 1947 to narrow and exclude certain activities from compensable work. Under the Portal-to-Portal Act, “walking, riding, or traveling to and from the actual place of performance of the principal activity” is expressly excluded from compensable work, as well as “activities...
which are preliminary and postliminary to said principal activity or activities.” 29 U.S.C. § 254.

B. Principal Activity

The Supreme Court has interpreted the term “principal activity” to include all activities that are an “integral and indispensable” part of the principal activities (i.e., activities that are “an intrinsic element” of the principal activities and “one with which the employee cannot dispense if he is to perform his principal activities”). Id. at 517. Thus, in Busk, the Supreme Court held that time spent by warehouse employees at an Amazon fulfillment center waiting to undergo security screenings and actually undergoing such screenings at the end of the workday to prevent theft was excluded from “work” under the Portal-to-Portal Act, because the activity was not “integral” to their principal work activity (which was to retrieve products from warehouse shelves and package those products for shipment to Amazon customers) nor was it indispensable, since the employees could perform their principal activities without undergoing the security screenings—i.e., the security screenings could have been eliminated without impairing the employees’ ability to complete their work. Id.

The Court rejected the Ninth Circuit’s test, which included as compensable activities, those that the employer required the employee to perform and those that were for the “benefit of the employer,” finding the test inconsistent with the Portal-to-Portal Act and overbroad.

C. Compensable?

Where does all this leave our weekend and after-hours email checkers? If employees are writing and responding to e-mails relating to substantive work they were hired to perform, the activity is unlikely to be a “preliminary or postliminary” activity, and instead a principal activity for which they were hired to perform. So it is “work.” But does every second count?

III. The “De Minimis” Rule

Assuming the activity constitutes “work” and is not excluded as “preliminary” or “postliminary” activity under the Portal-to-Portal Act, the answer may depend on the application of the “de minimis” rule, derived from the Latin phrase de minimis non curat lex, Latin for “the law does not take account of trifles.”

A. Created by Court

The de minimis rule is not contained in the FLSA. Rather, it is a judicial creation, established by the Supreme Court over 60 years ago in Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680 (1946), a case involving whether walking to and from the time clock to the actual place where productive work is performed is considered “work” under
the FLSA. As noted above, the Court held it was “work,” but Congress quickly overturned this ruling in the Portal-to-Portal Act.

But even after establishing walking time was work, the Court noted that some or all of the time spent walking still might not be compensable under “application of a de minimis rule.” The Court explained that the workweek contemplated by FLSA must be computed “in light of the realities of the industrial world” and that “when the matter in issue concerns only a few seconds or minutes of work beyond the scheduled working hours, such trifles may be disregarded.” Id. at 692. The Court explained that “split-second absurdities are not justified by the actualities of working conditions or by the policy of the Fair Labor Standards Act” and that “it is only when an employee is required to give up a substantial measure of his time and effort that compensable working time is involved.” And so the de minimis rule was born.

B. Adopted in Regulations

Following Anderson, the DOL incorporated the doctrine into its regulations, stating that in recording working time under the FLSA, “insubstantial or insignificant periods of time beyond the scheduled working hours, which cannot as a practical administrative matter be precisely recorded for payroll purposes, may be disregarded.” 29 C.F.R. 785.47. The Supreme Court recently noted this regulation may apply a “stricter” standard than originally articulated by the Court in Anderson. Sandifer v. United States Steel Corp., 134 S. Ct. 870, 880, n. 8. Under the regulations, for example, “[a]n employer may not arbitrarily fail to count as hours worked any part, however small, of the employee’s fixed or regular working time or practically ascertainable period of time he is regularly required to spend on duties assigned to him.” Id.

C. Circuit Courts

In applying the de minimis rule, courts have generally analyzed three factors in determining whether the time spent in a particular activity should be considered de minimis, and therefore not compensable: (1) the practical administrative difficulty of recording the additional time; (2) the size of the claim in the aggregate; and (3) whether the claimants performed the work on a regular basis. See Corbin v. Time Warner Entertainment-Advance/Newhouse, 821 F.3d 1069 (9th Cir. 2016) (applying de minimis rule to employee who alleged he was denied compensation for one minute spent loading computer program prior to logging into time system); Singh v. City of New York, 524 F.3d 361, 371-72 (2d Cir. 2008) (finding additional commuting time resulting from carrying inspection material de minimis as a matter of law where the time amounted to ten minutes, “give or take,” was administratively difficult to record, and occurred sporadically); Lindow v. United States, 738 F.2d 1057 (9th Cir. 1984) (finding time spent by employees who arrived prior to their shift to review a shift log from the prior shift, averaging, 7-8 minutes, to be de minimis); Kellar v. Summit Seating, Inc., 664 F.3d 169 (7th Cir. 2011) (recognizing the de minimis rule, but refusing to apply it where the employee regularly worked 10-45 minutes each day prior to her scheduled shift).
D. Supreme Court

While circuit courts of appeal have been uniform in recognizing the *de minimis* rule, the Supreme Court’s recent decision in *Sandifer* has raised some doubts as to the scope of the *de minimis* rule. In *Sandifer*, the issue was whether steel workers were entitled to compensation for time spent changing into work gear. Under Section 3(o) of the FLSA, “time spent in changing clothes” is excluded from hours worked if such agreement is set forth in a collective bargaining agreement. But the FLSA does not define “clothes,” and the issue was whether the gear employees were required to don and doff constituted “clothes.” The Court held some of the gear was “clothes” under the FLSA (and therefore excluded under §3(o)), but a few items fell outside that definition.

In addressing the small amount of time necessary to put on and take off the additional non-clothes items, the Court noted that some courts would exclude such time under the *de minimis* rule, but the Supreme Court declined to do so, stating the rule did not “fit comfortably within the statute” since Section 3(o) “is all about trifles” and that “there is no more reason to disregard the minute or so necessary to put on classes, earplugs, and respirators, than there is to regard the minute or so necessary” to put on other clothes. Instead, the Court found the additional time was non-compensable so long as most of the time in question was “time spent in changing clothes.”

While the Supreme Court’s treatment of the *de minimis* rule is likely limited to its application in the § 3(o) context, the Court’s decision not to use the *de minimis* rule has raised questions regarding the strength of the doctrine, particularly where employers are capable, through electronic timekeeping systems, of recording small increments of time.

E. State Law

Employers must also consider state law. Recently, for example, the Ninth Circuit specifically asked the California Supreme Court to answer the certified question of whether California adopts the federal *de minimis* rule. See *Troester v. Starbucks Corp.*,, 2016 U.S. App. LEXIS 23587 (9th Cir. June 2, 2016). The California Supreme Court accepted the certified question, and a decision is expected in 2017. See *Troester v. Starbucks Corp.*,, 2016 Cal. LEXIS 6801 (Cal. Aug. 17, 2016).

F. Compensable?

While an employee who occasionally sends a handful of work-related e-mail after regular work hours and spends only a few seconds or minutes reading or responding to an e-mail, would likely not be entitled to compensation under the *de minimis* rule, where use of e-mail is a regularly occurring event, and in the aggregate amounts to more than 10 minutes, the rule may not apply. See *Allen v. City of Chicago*, 2015 U.S. Dist. LEXIS 165906, at *16 (N.D. Ill. Dec. 10, 2015) (“While not every response to a phone call, or review of follow up on an email, constituted compensable work activity, we find that plaintiffs have proven that at least some of their off-duty BlackBerry activity qualifies as such.”); *Gomley v. Crossmark, Inc.*, 2015 U.S. Dist. LEXIS 54037 (D. Id. Apr. 22, 2015)
(finding employee who was required to check e-mail prior to leaving for work, sync a handheld device, organize folders, and load a car before appointments, was engaged in non-de minimis work activity); *Mahshie v. Infinity Ins. Co.*, 2012 U.S. Dist. LEXIS 163569 (S.D. Fla. Nov. 15, 2012) (denying summary judgment where employee alleged he performed work at home, including checking e-mail, because fact issue existed as to whether the time was de minimis).

The employer’s own computer systems will often be used as evidence to establish the regularly occurring nature of the work, as much of the e-mail communication will be between the employees and their managers. And the frequency of the e-mail can often be quickly determined.

IV. *The “Continuous Workday Rule”*

Another area where technology can result in unforeseen wage and hour exposure is the application of the “continuous workday rule.”

Under the FLSA, time spent by employees commuting to and from work is not included in determining “hours worked.” 29 C.F.R. § 785.35. Thus, an employer is not required to include such time in determining whether an employee has worked overtime or in determining whether employees have received at least the minimum wage. The Portal-to-Portal Act, which amended the FLSA in 1947, sets this forth explicitly. See 29 U.S.C. § 254(a) (excluding from hours worked, time spent “walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform”). But time spent traveling after the workday has begun or before the workday has ended is treated differently. Time spent traveling from job site to job site, for example, after the workday has begun, must be counted as hours worked.” 29 U.S.C. § 785.38. Similarly, the travel of an employee who is required to travel from a worksite at the end of the day to another work location (e.g., main office) to drop off tools or a vehicle, or otherwise complete required paperwork, is counted as hours worked.

This rule is colloquially known as the “continuous workday rule,” and under the rule, once the workday has begun, all travel that occurs between the beginning and end of the workday is part of the continuous workday, and must be included in hours worked. See *IBP, Inc. v. Alvarez*, 546 U.S. 21, 37 (2005) (“[D]uring a continuous workday, any walking time that occurs after the beginning of the employee’s first principal activity and before the end of the employee’s last principal activity is . . . covered by the FLSA.”); 29 C.F.R. § 790.6(b).

A. *Kuebel*

The rule is relatively straightforward to apply to workers who begin and end their workday at the employer’s place of business. Once they arrive, the workday has begun; once they finish work and punch out, the workday has ended. All time spent traveling that occurs between those two bookends is compensable. But the rule becomes more
difficult to apply when the employees do not start or end their workday at the employer's place of business. And the increased use of technology and employee access to and use of employer computer systems, including company intranet, e-mail, and text messages, has made the rule more difficult to apply, and has resulted in potentially latent exposure to wage and hour violations.

Take, for example, the plaintiff in *Kuebel v. Black & Decker, Inc.*, 643 F.3d 352 (2d Cir. 2011). The plaintiff was employed by Black & Decker (“B&D”) as a Retail Specialist. In that role, he was assigned to national home and garden supply chain stores and was responsible for marketing and merchandising B&D’s products in those stores (e.g., ensuring the products were appropriately stocked, priced, and displayed). As relevant here, the plaintiff did not report to a central office, but instead worked from his home, commuting to various stores each day, some close by, but others up to three hours from his home. B&D paid for only a portion of his commuting time — travel time in excess of 60 miles from his home on either leg of the commute.

In order to report the time spent at each store, he was given a digital device to record the time, which then had to be plugged into his home computer and synced with the Company’s server. In addition to this task, however, he also performed other administrative tasks at home, such as reading and responding to company e-mails, checking voicemail, printing and reviewing sales reports, organizing product tags, making display signs, taking online training courses, and loading and unloading his car.

He brought suit under the FLSA and state law, alleging B&D was required to pay him not only for the time spent performing those activities (which B&D agreed was work hours), but also for the entire time spent traveling to and from the store locations (not just the time spent commuting in excess of 60 miles). Why? The continuous workday rule, of course. He alleged the work he performed at home in the morning and evening (e.g., checking e-mail, voicemail, and other administrative work) was the beginning and end of this workday, and thus, the continuous workday rule was triggered, making all the time spent commuting to and from his home compensable.

While the Second Circuit acknowledged the existence of the continuous workday rule, the Court nonetheless held the rule was not triggered even though he may have performed compensable work at home. The Court noted he was not *required* to perform the administrative work immediately when he arrived home or immediately before leaving home. Rather, he had “flexibility” in deciding when to perform those tasks. He could, for example, wake up, check his email or voicemail, then take his kids to school and go to the gym, and then drive to work. The period between the time he performed those administrative tasks and the time he began commuting, therefore, was more akin, the Court held, to periods when employees are completely relieved from duty and are long enough to enable workers to use the time effectively for their own purposes, which under DOL regulations is non-compensable “waiting time.” *See Rutti v. Lojack Corp.*, 596 F.3d 1046, 1060 (9th Cir. 2010) (technician’s evening commute was not rendered compensable merely because he performed the arguably principal activity of uploading
data to his employer after returning home because he was free to make the transmission any time between 7:00 p.m. and 7:00 a.m.).

The result may have been different if B&D had required the plaintiff to perform administrative work immediately before or after leaving work. Thus, permitting or requiring employees to perform work at home using electronic devices can lead to significant wage/hour exposure by converting an otherwise non-compensable commute to working hours as a result of the “continuous workday” rule. See, e.g., Harris v. Reliable Reports, Inc., 2014 U.S. Dist. LEXIS 31223 (N.D. Ind. Mar. 10, 2014) (finding employee who worked as a field inspector from his home and alleged he was required to log into the employer’s computer network and complete administrative tasks prior to leaving home and after returning home after the last customer visit stated a claim under the continuous workday rule for time spent traveling to his first appointment and from his last appointment); Bowman v. Crossmark, Inc., 2012 U.S. Dist. LEXIS 93345 (E.D. Tenn. July 5, 2012) (denying summary judgment to employer where employees sought compensation for commuting time under the continuous workday rule and alleged they were required to perform job-related activities in their homes immediately before traveling to their first retail location and immediately after returning home from their last retail location, such as checking email, confirming work schedules, and reporting to a company computer system); Gomley v. Crossmark, Inc., 2015 U.S. Dist. LEXIS 54037 (D. Id. April 22, 2015) (same). But see Bettger v. Crossmark, 2014 U.S. Dist. LEXIS 82031 (M.D. Pa. June 17, 2014) (granting summary judgment to employer in action seeking compensation for commuting time under the continuous workday rule due to the absence of evidence that the employee was required to check email or perform administrative tasks immediately prior to driving to the first work location).

B. Compensable?

To limit the risk of exposure to such claims, employers should make clear to employees who work from home, whether they are reviewing and responding to e-mail, voicemail, or performing other tasks, that this work need not be performed at any specific time, particularly immediately before or after their commute home. Of course, any time spent actually working (perhaps subject to the de minimis rule) must be paid. Further, employers should make clear that any instruction by a supervisor not to record hours worked should be disregarded and reported to management or human resources immediately.

V. Hidden “Work”

Employees sometimes perform work at home or outside the regular work hours in contravention to employer policies prohibiting off-the-clock work. They may do so voluntarily, without reporting the time, and only months (or years) later seek compensation for the time after their employment has been terminated. As discussed previously, checking e-mail may constitute “work” and may be too substantial to be excluded from hours worked under the de minimis rule. The central issue in this case
thus become not whether the activity is “work,” but whether it is *compensable* work. And that depends on whether the employer has knowledge that the work was performed.

**A. Knew or Should Have Known**

A key element of proving a claim for unpaid minimum wage or overtime is demonstrating that the employer knew or should have known that the employee was working additional time for which she was not being compensated. For compensation to be awarded, plaintiff’s activities must not only satisfy the definition of work, but must also be performed with the employer’s knowledge. *Holzapfel v. Town of Newburgh*, 145 F.3d 516, 524 (2d Cir. 1998); *Forrester v. Roth’s I.G.A. Foodliner, Inc.*, 646 F.2d 413, 414 (9th Cir. 1981) (“An employer who knows or should have known that an employee is or was working overtime must comply with the provisions of [29 U.S.C.] § 207 [mandating overtime pay]”); *Kellar v. Summit Seating, Inc.*, 664 F.3d 169 (7th Cir. 2011) (“To state a claim under the FLSA, [plaintiff] must show that [employer] had actual or constructive knowledge of her overtime work.” While an employer must pay for work it suffers or permits, see 29 C.F.R. § 785.11, an employer cannot suffer or permit an employee to perform services about which the employer does not know. *Holzapfel*, 145 F.3d at 524.

**B. Knowledge, Actual or Constructive**

Of course, an employer need not have actual knowledge of such work; constructive knowledge will suffice. See *Reich v. Department of Conservation and Natural Resources*, 28 F.3d 1076, 1082 (11th Cir. 1994). But the FLSA standard for constructive knowledge in the context of overtime is whether a defendant “should have known,” not whether it “could have known.” *Hertz v. Woodbury County*, 566 F.3d 775, 781 (8th Cir. 2009). And the duty to inquire is not unlimited, particularly where the employer has a policy against unauthorized overtime and requires its employees to submit overtime compensation claims. *Hellmers v. Town of Vestal*, 969 F. Supp. 837, 845-46 (N.D.N.Y 1997). Courts have held, for example, that mere access to information regarding the plaintiff’s activities did not constitute constructive knowledge that the employee was working overtime. *Newton v. City of Henderson*, 47 F.3d 746, 749 (5th Cir. 1995). In *Fairchild v. All American Check Cashing, Inc.*, 815 F.3d 959 (5th Cir. 2016), for example, the plaintiff worked as a manager-trainee for a check cashing company and alleged she was owed overtime pay for work performed that she did not record. Although the Company has a policy requiring employees to record all hours worked and paid her overtime for work hours recorded, she failed to record the time because she believed needed to work additional hours “to get the job done” and that it would not be paid. She claimed the employer was nonetheless responsible for paying for the overtime hours worked because her computer usage reports showed she was working after she had already clocked out, and thus established “constructive knowledge” that work was performed. The Court rejected her argument, finding that although the employer “*could have* potentially discovered that she was working overtime based on the usage reports, the question here is whether the employer *should have* known.” Id. at 965 (internal quotations omitted) (emphasis added). “Mere access” to
information is insufficient for imputing constructive knowledge, the Court held. See also Hertz v. Woodbury County, 566 F.3d 775, 781 (8th Cir. 2009) (finding employer had no obligation to check computer dispatch records to determine whether police officers were working overtime because records were not used for payroll purposes, but instead to determine whether officers were available to respond to emergencies).

Similarly, in Allen v. City of Chicago, 2015 U.S. Dist. LEXIS 165906, *16 (N.D. Ill. Dec. 10, 2015), for example, police sergeants alleged they were owed overtime for time spent monitoring and responding to e-mail on their BlackBerrys when they were off-duty. Although the Court found that employees did in fact respond to e-mail and that the time spent on such activity was not de minimis, and thus “work,” the Court found the City, nevertheless, was not liable for the uncompensated hours because the plaintiffs failed to prove the employer had actual or constructive knowledge the work had been performed, particularly where the City had established procedures for reporting time worked off-duty, and some sergeants had submitted request for time spent responding to e-mail off duty, negating their allegation that reporting such time was discouraged. The Seventh Circuit is set to hear the case in April 2017.

In several recent cases, however, courts have denied summary judgment to the employer, finding issues of material fact concerning whether the employer had actual or constructive knowledge of the plaintiff’s overtime work, including evidence from an employer’s own computer systems and electronic data. Mahshie v. Infinity Ins. Co., 2012 U.S. Dist. LEXIS 163569 (S.D. Fla. Nov. 12, 2012), is a good example. There, the plaintiff was employed as an insurance appraiser who was responsible for inspecting vehicles and submitting appraisals for repair. He traveled within his region to conduct the appraisals, but otherwise worked from home. He claimed the hours reported to his supervisors were inaccurate, and that he was owed hundreds of hours of overtime for time spent working from home, including time spent drafting e-mails. He claimed his supervisors knew he was working more hours than were reported on his timecards because the e-mail communications he sent occurred after the time reported on his time card. Id. at *13 (“[Plaintiff] produced an email sent to his supervisor . . . at 7:09 PM on June 2, 2010; however [Plaintiff’s] timecard . . . shows that he clocked out at 5:30 PM”). In denying summary judgment, the Court cited the mismatch between his time card and his e-mail communication as evidence that work was performed beyond the reported hours and that the employer had knowledge of that work.

VI. On-Call Time and On-Call Shifts

Employers have turned to digital technology and sophisticated scheduling software to maximize the use of labor hours, including having employees “on-call” and ready to work when needed, or requiring employees to call-in before a scheduled shift to determine whether work is available. But is an employee who is not at work but has been placed “on-call” by an employer, or who is required to call in to see if work is available, entitled to compensation for the time that she/he is on-call? The regulations defining on-call work are thin, and courts have struggled to describe when time spent on
call is compensable, identifying several factors to use in making this determination, and ultimately resulting in a very fact-intensive inquiry.

A. Regulations

DOL regulations distinguish compensable and non-compensable “on call” time depending on whether an employee has been “engaged to wait” or is “waiting to be engaged.” 29 C.F.R. § 785.17 states:

An employee who is required to remain on call on the employer’s premises or so close thereto that he cannot use the time effectively for his own purposes is working while ‘on call.’ An employee who is not required to remain on the employer’s premises but is merely required to leave word at his home or with company officials where he may be reached is not working while on call.

B. Cases

The Supreme Court addressed the compensability of on-call time in two early FLSA cases, Armour & Co. v. Wontock, 323 U.S. 126 (1944), and Skidmore v. Swift & Co., 323 U.S. 134 (1944). In both cases, the Court focused on the employees’ degree of freedom during the time that they were “on-call” but were not called to work. The Court focused on whether the time on-call was spent primarily for the employee’s benefit or the employer’s. The Supreme Court’s guidance instructs lower courts to conduct broad inquiries, taking into account all the circumstances of a given on-call arrangement: the agreements entered into by both parties; the actual conduct and work performed based on these agreements; the nature of work/service in relation to the amount of waiting time (downtime); and “all other relevant circumstances.”

Lower court inquiries as to the compensability of on-call time are often determined by asking whether the employee is “engaged to wait,” which is compensable, or is “waiting to be engaged,” which is not compensable. Circuit courts have emphasized that the most significant factors in this “engaged” inquiry are (1) the degree to which the employee is free to engage in personal activities; and (2) the agreements between the parties.

The Fifth Circuit’s decision in Bright v. Houston Northwest Medical Center Survivor, Inc., 888 F.2d 1059 (5th Cir. 1989), an oft-cited case on this subject, is instructive. It highlights how even severe geographical constraints on an employee’s on-call time may not be enough to make that time compensable when the substantive constraints are relatively minimal. The Court focused on what it considered the “critical issue” of “whether the employee can use his [on-call] time effectively for his or her own purposes.” Because the answer was “Yes,” the Court determined the on-call time was not compensable. The Fifth Circuit in Bright essentially states that the being “permanently on-call,” while burdensome, is irrelevant to a determination of compensability under FLSA because the amount of time says nothing about the substantive constraints.
In *Owens v. Local No. 169, Ass'n of W. Pulp & Paper Workers*, 971 F.2d 347 (9th Cir. 1992), the Ninth Circuit set out a non-exhaustive list of factors courts should consider in gauging a given employee’s relative freedom when determining the compensability of on-call time. The often-cited *Owens* factors are:

1. whether there was an on-premises living requirement;
2. whether there were excessive geographical restrictions on an employee’s movements;
3. whether the frequency of calls was unduly restrictive;
4. whether a fixed time limit for response was unduly restrictive;
5. whether the on-call employee could easily trade on-call responsibilities;
6. whether the use of a pager could ease restrictions; and
7. whether the employee had actually engaged in personal activities during call-in time.

The Ninth Circuit went on to caution, however, that since “no one factor is dispositive,” a successful compensability determination demands that the factors restricting personal freedom be balanced against those promoting/facilitating it in deciding whether the employee is so restricted that he or she is effectively “engaged to wait.”

**C. Shift Scheduling**

The scheduling of on-call shifts has become the most recent battleground regarding whether on-call time is compensable. Essentially, an on-call shift requires the employee in question to call in before their shift has been scheduled to start to see if they are still required to come to work. If the employee is not required to come in to work for his/her shift, he/she is not compensated for the shift.

On-call shift scheduling is attractive to employers for several reasons. It allows employers to tailor and adjust their workforce in real-time to meet anticipated labor needs that can be analyzed by sophisticated computer modules. If the software determines for whatever reason (weather, traffic, missed delivery, product shortfall, and so on) that the employer only needs half of their employees that day or for the next several days, the employer is able to reduce its workforce at a moment’s notice, saving a great deal in labor costs. These programs also conversely allow employers to be able to ramp up labor needs when demanded.

This method of scheduling has become particularly popular in both the food and retail industries where employers are constantly attempting to avoid paying for excess labor during stagnant periods and to avoid labor shortfalls when business is active. Companies that use on-call shift scheduling often consider a variety of factors, including weather, customer traffic, major sporting events, and the like, to predict whether or not they will need their entire workforce for a particular shift.
While on-call shift scheduling has become popular with employers, there are concerns about whether this type of scheduling is fair to employees under the FLSA because it leaves them with totally unpredictable work schedules. For that reason, there has been pushback from states and from unions. One pressing question is how much lead time is reasonable for an employer to cancel a shift. If an employee is only able to call in an hour before their shift is scheduled to start to find out if they are required to come to work the employee may be effectively precluded from securing other work for this day. If the employee is not required to work the employee is not only losing the compensation she/he would have earned from working that shift, but has also been denied the opportunity to fully utilize the time that they would have spent working the shift. Alternatively, if an employer has given the employee several days’ notice that the employee will not be required to work a particular shift, the employee would be able to schedule the time otherwise spent working effectively. The employee, however, would still lose the compensation that he/she might have otherwise earned had the scheduled shift not been canceled by the employer.

On-call shift scheduling has been attacked by employees in class action suits as both unfair, and illegal under the FLSA. Both California and New York have become battleground states, with courts attempting to decide whether or not employees should be compensated for “on-call” shifts even if they are not required to work. Unfortunately, current state and federal law do not directly address the lawfulness of on-call shifts, which has led to courts failing to establish bright line rules.

Recently state officials have begun investigations into the practice of on-call shift scheduling. This effort, which has been spearheaded by New York Attorney General Eric Schneiderman, has called into question the on-call scheduling practices of several large retailers.

VII. Rounding

Often employees are not compensated according to the exact amount of time they work. Instead, employers utilize a process of “rounding.” For example, an employee’s time punches may be rounded to the nearest five minutes or nearest one-tenth or quarter of an hour. The reasoning behind allowing employers to employ such a procedure is that, over time, the amounts average out so that employees are fully compensated for all of the time they actually work. In some ways, however, rounding is a function of a bygone era, when not all employers had access to sophisticated timekeeping systems.

Rounding is still permissible as long as the practice is both neutral on its face and in practice. An employer’s rounding policy, for example, will be found to be in compliance if it is applied consistently and, on average, it favors neither underpayment nor overpayment. On the other hand, employers will be found to be in violation of the FLSA when they systematically undercompensate employees or otherwise fail to compensate employees properly for all the time they have actually worked.
A. Regulations

The DOL’s principal regulation addressing rounding, found at 29 C.F.R. § 785.48(b), provides:

It has been found that in some industries, particularly where time clocks are used, there has been the practice for many years of recording the employees’ starting time and stopping time to the nearest 5 minutes, or to the nearest one-tenth or quarter of an hour. Presumably, this arrangement averages out so that the employees are fully compensated for all the time they actually work. For enforcement purposes this practice of computing working time will be accepted, provided that it is used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked.

29 C.F.R. § 785.48(b) (emphasis added).

Another relevant regulation, 29 C.F.R. § 785.48(a), explains that differences between clock records and actual hours worked may be disregarded in certain instances:

Time clocks are not required. In those cases where time clocks are used, employees who voluntarily come in before their regular starting time or remain after their closing time, do not have to be paid for such periods provided, of course, that they do not engage in any work. Their early or late clock punching may be disregarded. Minor differences between the clock records and actual hours worked cannot ordinarily be avoided, but major discrepancies should be discouraged since they raise a doubt as to the accuracy of the records of the hours actually worked.

29 C.F.R. § 785.48(a) (emphasis added).

As the DOL Wage and Hour Fact Sheet No. 53 explains, employers may violate the FLSA minimum wage and overtime pay requirements when they always round employee time down. For example:

Employee time from 1 to 7 minutes may be rounded down, and thus not counted as hours worked, but employee time from 8 to 14 minutes must be rounded up and counted as a quarter hour of work time.

B. Neutral as Applied

The Ninth Circuit recently applied these principles and upheld a rounding practice in Corbin v. Time Warner Entm’t-Advance, 821 F.3d 1069 (9th Cir. 2016). The plaintiffs were call center employees who alleged they were shorted time due to rounding. The
Court held, however, that the rounding practice did not violate 29 C.F.R. § 785.48(b) because it was neutral both facially and as applied as it allowed employees to gain overtime compensation just as easily as it caused them to lose it. The Court rejected the notion that an employer is required to analyze whether rounding evens out every pay period, a finding that would render the regulation useless.

The decision is instructive because it required the employer to demonstrate that the rounding practice was *neutral as applied* in order to obtain summary judgment. In practice, this may be a very difficult burden to meet for an employer seeking to defend a rounding practice. Consider a typical rounding practice in a factory environment. An employee’s shift is from 7:00 a.m. to 5:00 p.m. As long as the employee clocks in and out within 15 minutes of their scheduled time, their time is “rounded” to the schedule. This is clearly a “facially neutral” policy. Assume the rounding practice is accompanied by a typical attendance policy providing that employees are disciplined if they clock in “late” (i.e., after 7:00 a.m.) or clock out “early” (i.e., before 5:00 p.m.). In this case, employees are far more likely to clock in before 7:00 a.m. and after 5:00 p.m. in order to avoid discipline. If the employees follow that practice, the rounding practice *as applied* will always benefit the employer. This type of typical rounding practice is unlawful.

Consider as an example of such a quandary the decision in *Gonzalez v. Farmington Foods, Inc.*, 296 F. Supp.2d 912 (N.D. Ill. 2003). In that case, the court found that there was a genuine issue of material fact as to whether Farmington’s practices of editing and rounding employees’ times was permissible. Plaintiffs documented thousands of minutes for which employees had not been paid. Although “facially neutral,” the court held that there was a genuine issue of material fact as to whether the method by which the Kronos timekeeping system rounds employees’ times to the nearest quarter hour resulted in failing to compensate employees properly for the time they worked.

VIII. **Meal Break Claims and Automatic Meal Break Deductions**

Another area where technology and wage and hour compliance can often intersect is whether employee meal periods must be considered hours worked. While an employer is not required to compensate employees for meal periods, litigation has arisen when meal periods are interrupted.

A. Regulations

The DOL regulation on this point appears at 29 C.F.R. § 785.19:

(a) Bona fide meal periods are not worktime. Bona fide meal periods do not include coffee breaks or time for snacks. These are rest periods. *The employee must be completely relieved from duty for the purposes of eating regular meals.* Ordinarily 30 minutes or more is long enough for a bona fide meal period. A shorter period may be long enough under special conditions. The employee is not relieved if he is required to
perform any duties, whether active or inactive, while eating. For example, an office employee who is required to eat at his desk or a factory worker who is required to be at his machine is working while eating.

(b) It is not necessary that an employee be permitted to leave the premises if he is otherwise completely freed from duties during the meal period.

29 C.F.R. § 785.19 (emphasis added).

B. Cases

The majority of circuits have rejected the DOL’s “completely relieved from duty” test and instead adopted a “predominant benefit” test whereby the court determines whether the employer or the employees are the predominant beneficiaries of the breaks. These Circuits include the Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Tenth and Eleventh Circuits. See Reich v. S. New Eng. Telecomms. Corp., 121 F.3d 58, 64 (2d Cir. 1997); Roy v. Cnty. of Lexington, S.C., 141 F.3d 533 (4th Cir. 1998); Bright v. Houston N.W. Med. Ctr. Survivor, Inc., 934 F.2d 671, 677 (5th Cir. 1991); Hill v. United States, 751 F.2d 810, 814 (6th Cir. 1984); Alexander v. City of Chicago, 994 F.2d 333, 337 (7th Cir. 1993); Henson v. Pulaski Co. Sheriff Dep’t, 6 F.3d 531 (8th Cir. 1993); Lamon v. City of Shawnee, Kan., 972 F.2d 1145, 1155 (10th Cir. 1992); Birdwell v. City of Gadsden, Ala., 970 F.2d 802, 808 (11th Cir. 1992). In these circuits, the meal period as a whole is examined to determine whether it is for the “predominant benefit” of the employer or the employees. The predominant benefit test denies compensability if the employees receive the predominant benefit of their meal periods.

C. Automatic Deductions

Some employers do not require employees to punch in and out for lunch, but instead use an automatic deduction of 30 or 60 minutes for lunch. While automatic meal deduction systems are lawful under the FLSA, the automatic meal break deductions must accurately reflect breaks taken.

IX. Technology and the Administrative Exemption

Since its inception, the administrative exemption has proved difficult for courts to apply. Even the DOL itself struggles to define the exemption and has changed its position on the applicability of the exemption to various professions over the years. The struggle to define positions that satisfy the exemption has become all the more complicated by technology, and the ability of computers and artificial intelligence to exercise the type of discretion traditionally reserved for the human mind.

A. Regulations

Section 213(a) of the FLSA states that the FLSA’s wage and overtime requirements will not apply to “any employee employed in a bona fide executive,
administrative, or professional capacity.” 29 C.F.R. § 541.200 provides the general rule for employees exempt from minimum wage and overtime under the “administrative” exemption, and provides:

(a) The term “employee employed in a bona fide administrative capacity” in section 13(a)(1) of the Act shall mean any employee:
(2) Whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer’s customers; and
(3) Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

With respect to the “exercise of discretion and independent judgment with respect to matters of significance” component of the administrative exemption, the DOL’s fact sheet provides:

In general, the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered. The term must be applied in the light of all the facts involved in the employee’s particular employment situation, and implies that the employee has authority to make an independent choice, free from immediate direction or supervision. Factors to consider include, but are not limited to: whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices; whether the employee carries out major assignments in conducting the operations of the business; whether the employee performs work that affects business operations to a substantial degree; whether the employee has authority to commit the employer in matters that have significant financial impact; whether the employee has authority to waive or deviate from established policies and procedures without prior approval, and other factors set forth in the regulation. The fact that an employee’s decisions are revised or reversed after review does not mean that the employee is not exercising discretion and independent judgment. The exercise of discretion and independent judgment must be more than the use of skill in applying well-established techniques, procedures or specific standards described in manuals or other sources.

B. Exercise of Judgment

In the age of technology, many jobs that traditionally met the “exercise of discretion and independent judgment with respect to matters of significance” test may no longer satisfy the exemption because computers now exercise the judgment that used to be exercised by humans. Today, computers can engage in the “comparison and the evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered.” Indeed, computers can engage in this kind of analysis far more efficiently and objectively than humans can.
One example is the position of a loan originator. Before sophisticated computers that were capable of synthesizing big data, individuals were called upon to make determinations of whether an individual, family or business qualified for a loan. These types of decisions satisfied the administrative exemption requirements, including the “exercise of discretion and independent judgment” element. Now, these types of decisions are made by computers based on information inputted by humans that are instructed as to what information they need to gather and enter into the computer so that the computer can make the determination objectively based on the data provided. In these circumstances, courts (and the DOL) have concluded that the individual entering the information into the computer is not exercising sufficient discretion and independent judgment. The result in this type of situation could be different if the individual is deciding which information is pertinent to enter into a computer that generates the result, but even then, most courts (and the DOL) would determine that the position fails to satisfy the “exercise of discretion and independent judgment” prong of the administrative exemption.

In short, because of technology, the number of jobs exercising true discretion and independent judgment as to matters of significance has shrunk. Unless a position truly has authority to formulate policies or practices or make decisions based on policy guidance in matters that commit the business in a material way, rather than simply executing decisions or guidance made by others, classifying the employee as exempt under the administrative exemption is a risky proposition. Exempt Administrative employees have decisionmaking authority. They can have the authority to deviate from established policy to make decisions that bind the company without approval from superiors.

X. Failure to Reimburse Employees for Expenses Related to Using Technology for Work

While the FLSA does not require reimbursement of an employee’s business expenses, failure to compensate employees for the cost of using electronic devices for work can lead to FLSA or state law violations. See Castellanos-Contreras v. Decatur Hotels LLC, 559 F.3d 332, 339 (5th Cir. 2009) (“The FLSA’s provisions do not require reimbursement of the employee-incurred expenses.”), vacated on other grounds by 622 F.3d 393 (5th Cir. 2010).

A. Non-Exempt Employees

Nonetheless, the failure to reimburse non-exempt employees for their business expenses, including the use of electronic devices such as cellular phones, can still result in an FLSA violation if doing so reduces the employee’s pay below the minimum wage or the overtime premium. See, e.g., U.S. Dep’t of Labor Opinion Ltr., FLSA2006-7, dated Mar. 10, 2006, available at https://www.dol.gov/whd/opinion/FLSA/2006/2006_03_10_07_FLSA.htm (“With respect to nonexempt employees, an employer may not lawfully require an employee to pay for
an expense of the employer’s business if doing so reduces the employee’s pay below any statutorily-required minimum wage and overtime premium finally and unconditionally, or ‘free and clear.’ Violations occur in two ways: (1) directly, when an employer deducts the cost of furnishing the employee with tools or equipment used in the employer’s business from an employee’s pay; or (2) indirectly, when the employee must incur out-of-pocket expenses to buy the item and the employer fails to reimburse the employee for the outlay.”) (quoting 29 C.F.R. § 531.35); 29 C.F.R. § 531.35 (“[I]f it is a requirement of the employer that the employee must provide tools of the trade which will be used in or are specifically required for the performance of the employer’s particular work, there would be a violation of the [FLSA] in any workweek when the cost of such tools purchased by the employee cuts into the minimum or overtime wages required to be paid him under the [FLSA].”); see also Williams v. Grayco Cable Servs., 187 F. Supp. 3d 760 (S.D. Tex. 2016) (granting first-stage conditional certification of a collective action where plaintiff alleged cable technicians were required to pay for business expenses, including cell phones, which caused their wages to go below the minimum wage in violation of the FLSA); Bass v. PJCOMN Acquisition Corp., 2011 U.S. Dist. LEXIS 58352 (D. Colo. June 1, 2011) (following grant of conditional certification under the FLSA, granting certification of a class of delivery drivers who alleged they were required to incur job-related expenses, including cellular telephone expenses, which resulted in payment of hourly wages to them that were below the minimum wage required by the FLSA and Colorado law).

B. State Law

Some states offer employees broader protections than those contained in the FLSA concerning the reimbursement of business expenses. See, e.g., Cochran v. Schwan’s Home Service, Inc., 228 Cal. App. 4th 1137, 1140 (Cal. Ct. App. 2014) (“We hold that when employees must use their personal cell phones for work-related calls, [California] Labor Code section 2802 requires the employer to reimburse them. Whether the employees have cell phone plans with unlimited minutes or limited minutes, the reimbursement owed is a reasonable percentage of their cell phone bills.”); Schulz v. Qualxserv, LLC, 2012 U.S. Dist. LEXIS 58561 (S.D. Cal. Apr. 26, 2012) (granting certification of a class of service partners and representatives who, inter alia, were not reimbursed for out-of-pocket expenses, including cell phones and computers, even though these items were necessary to perform their job duties under California Labor Code § 2802); NY DOL Opinion Ltr., RO 08-0033, dated Dec. 1, 2008, (“[E]mployers may require [New York] employees to possess and maintain a pager as a condition of employment provided the following two conditions are met: first, the cost to the employee or purchasing and maintaining the pager does not bring the employee’s wages below the minimum wage for any workweek in which payments are made; second, the employee’s payment(s) to obtain and/or maintain the pager are not made by wage deduction or by separate payment to either the employer or any third party in which the employer has an interest or from which the employer derives a benefit.”).
XI. Reducing Exposure to Wage and Hour Risks Resulting from Use of Technology

1. Have Clear Policies Requiring Employees to Record All Hours Worked, Wherever Performed

As discussed above, the substantive work that employees perform at their homes, at a coffee shop, on a plane or anywhere else, is compensable work that is no different for purpose of the FLSA than work performed at the office. In 2017, unlike 1997, an employee’s “workplace” can be just about anywhere. However, many employers provide their employees with the ability, means and ease of working away from the office without sufficiently considering how to capture non-exempt employees’ work time performed away from the “workplace.”

Consider any non-exempt employee that is given a monthly stipend for a smartphone so that they can be reached when needed while away from the workplace. When this non-exempt employee receives emails from his/her manager or co-workers during hours in which the employee is not at work, this employee is diligent and returns those emails promptly. Sometimes, the boss’s emails require prompt return phone calls. Other times, the employee just has ideas that they want to share with the boss or other co-workers. When the employer made the decision to provide the stipend for the smartphone, the employer did not put in place any mechanism to capture the time this employee performs work on his/her phone. Not only might this time be compensable work, the employer may have created the very circumstances for this employee to be performing compensable work away from the office by providing the monthly stipend.

Non-exempt employees that have the means to be working away from the office on a laptop or smartphone must be provided with some means of recording this work time. Pretty much any means will do, whether it be an app on a smartphone to hit “Start” and “Stop” for time reviewing and responding to emails or time on the phone, or whether it be providing “exception sheets” that permit employees to submit additional time worked to payroll for processing.

2. Have Employees Verify Each Week in Writing that All Time Spent Working In and Outside the Office Has Been Recorded

While no system is fail-proof, requiring employees to verify each week in writing that they have recorded all time worked, both inside and outside the office, should reduce the risk of failing to pay for uncompensated time. Employees can still later argue they were instructed by their manager not to record all hours worked despite their verification; otherwise, the employee and the manager will have been acting in contravention of company policy and their verification proof of that fact. The verification could also include an additional affirmation that no manager has instructed the employee not to record their time, and include an 800 number to call to report any abuses.
3. **Prohibit Non-Exempt Employees from Performing Work Outside the Office & Discipline Employees Who Violate the Policy**

   Alternatively, if employers do not wish to incur the added payroll expense of the time non-exempt employees spend working away from the office, employers must promulgate policies and practices forbidding employees from engaging in such work. However, policies are not enough. Employers wishing to avoid this added payroll expense must also discipline employees who violate the policy.

4. **Consider Only Providing Smartphones to Exempt Employees & Configure Computer Systems to Prohibit Non-Exempt Employees from Accessing Company Servers or E-Mail**

   One means of reducing exposure to off-the-clock work performed by non-exempt employees is limiting company provided smartphones to only exempt employees. But this may not be enough. Employees often use their own smartphones or computers to access company servers and send and receive e-mail. Technology here can help as well. Employers can configure their computer systems so that non-exempt employees cannot access company computer systems outside their regular work hours—i.e., they may not log-in to the company’s servers or use company e-mail after work hours. Of course, nothing can stop them from sending or receiving e-mails using their own personal e-mail addresses, but managers should be trained only to communicate with non-exempt employees using company provided e-mail accounts (not through personal e-mail or texts) and if they become aware of non-exempt employees using personal e-mail addresses or using text messages, the managers should determine what work is being performed, why it is being performed outside of regular work hours, and either authorize it (and pay it) or instruct the employee not to perform the work (but pay for the work that has already been completed).

5. **Train Employees and Managers Regarding the Need for an Uninterrupted Meal Period**

   Managers and employees should be instructed that employees must receive an uninterrupted meal period and that managers should not e-mail, call, or assign tasks to employees while they are on their meal break. Employers should also consider prohibiting employees from eating at their desks so that they are not tempted to respond to e-mails or phone calls. Employees can later point to e-mails that were sent or phone calls that were made during their meal period as evidence that they did not receive an uninterrupted meal period. For example, if an employee clocks out for lunch at 12:30, but the phone logs show she made business related calls for 20 minutes between 12:30 – 1:30, the meal period may become compensable.
6.  **Limit Restrictions for Employees Who Are On-Call or Consider Providing Compensation for On-Call Time, but at Lower Hourly Rate**

As noted above, placing too many restrictions on employees who are on-call may convert the on-call time to compensable work time. Consider also providing employees who are on-call with hourly compensation at a lower rate, thereby ensuring the time has been compensated. But remember that paying for such time results in the hours becoming compensable work hours which must be added to their total hours worked, which may result in additional overtime.