

## Overtime Blues

By Tillman Coffey

(Labor Letter, August 2011)

Your handbook says, "No unauthorized overtime permitted." Your managers tell employees that they must get their job duties completed during regular work hours because there is a company-wide prohibition against working overtime. Your managers also tell employees to accurately record their hours worked. All good stuff, right? Could be.

But what if your employees understood (or claim they understood) the message to be: "to keep your job you must get your work done and if you have to work overtime to get it done, so be it. Just know that we don't want to pay for the overtime so I don't want you recording those hours. If you do I'll see you as being an inefficient slacker and I will 'correct' the time records to eliminate your overtime hours." This is *not* the message you intended to communicate.

This situation may seem farfetched because you know that non-exempt employees must record and be paid for all hours worked. You also know that the minimal "savings" your company would achieve by not paying its employees properly is outweighed by the practical risks of losing good employees and the legal risks for violating wage-hour laws – including potential personal liability. And, given that claims under wage and hour laws are one of the fastest growing areas of employment litigation, the risk of a legal challenge to a company's pay practices is greater now than in recent memory.

### The Problem

Many wage-hour lawsuits include allegations that supervisors instructed or "strongly encouraged" non-exempt employees to work off the clock or not to record all hours worked if they did not finish their job during "regular" hours. Some claimants are alleging that their supervisors made off-the-clock work a condition of continued employment. Others have alleged their managers only *implied* that "free" work was expected. Still other claimants allege that their managers made corrections or "overrides" to employees' time entries to avoid an overtime pay obligation. Whether any of the allegations are true is usually determined in a costly and disruptive lawsuit or government investigation.

Given the economy and other factors, one could envision how an employee could misinterpret the company's overtime policy and a manager's instructions to "git'er done" during regular work hours. Many companies see controlling labor costs as a key component to remaining competitive, and in

some cases, staying in business. An early and frequent casualty of labor cost-cutting moves is the elimination of authorized overtime and the concomitant premium pay required under federal (and in some cases state) law. In some situations, a manager's regular compensation or bonus may be based in part on how well he or she controls the compensation costs for the unit for which he or she is responsible. This backdrop may provide the basis for a plausible claim if employers are not diligent.

At the same time, and while working in the same tight economy, many employees are concerned about doing anything that could put their jobs in jeopardy. Failing to meet the employer's performance expectation is something that could do that. Faced with the "no overtime" edict and demands to complete their work or else, employees who fail to finish the job on time may decide to work "off the clock" to get the work done so they will not be considered slackers.

Employees may decide not to record the hours over 40 and rationalize their actions on the basis that staying "caught up" is to their benefit, even if it means foregoing pay for the work. They may even think that because they are responsible for recording their own time, no one will ever know or care.

Supervisors who are or should be aware of employees working off the clock put the company (and perhaps themselves) in jeopardy under the Fair Labor Standards Act (and many states' laws). Even if an employee signs a document specifically stating he or she does not want to be paid for the work, you still must record and pay the employee for all hours worked. Likewise, an employer is not immune from a legal challenge based on a failure to pay for all hours worked simply because the employee completed and acknowledged the supposed accuracy of the time records, if those records are not accurate. Under the law, it's the employer, not the employee, who is responsible for maintaining accurate records.

### **Help Prevent The Problem**

While there is nothing that you can do to prevent employees from fabricating allegations of off-the-clock work, you can take steps to minimize the risks. One step is to make sure the company's policy on recording all work hours and working overtime is clear and that it accurately and unambiguously communicates the company's position (*i.e.*, doesn't lead employees to "read between the lines" something that isn't there). Another preventive step is to make sure all supervisors understand that all non-exempt employees are to record and be paid for *all* hours worked, even unauthorized overtime.

Reminding supervisors that the law and company policy require that non-exempt employees who work any overtime (authorized or not) are to be paid properly may discourage a rogue manager from acting improperly. For employees who work unauthorized overtime, you may then treat the employee's unauthorized actions as a disciplinary matter the same as you would any other violation of policy. Prudent employers will document that they have reminded their supervisors of these legal requirements and that the supervisors put their jobs at risk by not adhering to them.

Still another step to lower the risk of a legal challenge is to review records of hours worked to determine if there appears to be an inordinate number of "overrides" or changes to time entries. If there are, determine why. Ideally, the reason for any override would be documented and would show the employee's concurrence in why the change was made. If employees are forgetting to clock in or out, address that issue with employees as a disciplinary matter. If, on the other hand, a supervisor is regularly changing times, get to the bottom of why this is happening.

Finally, be cognizant of dramatic changes in the recorded time it now takes to complete a job. If work that historically took over 40 hours to complete is now taking 40 hours or less, determine why that is happening. Are employees working more efficiently (good) or simply no longer recording their time accurately (very bad)?

## **The Bottom Line**

Keep in mind that employees are becoming more aware of these timekeeping issues and requirements. Last year the U.S. Department of Labor, Wage and Hour Division released a timesheet document and encouraged employees to keep their own, personal time records. Now, the DOL has taken the "personal" timesheet a step further and created an "app" that employees can download and use for recording time, which conveniently includes links to the DOL. Accordingly, the risk of a dispute over work hours and overtime could dramatically increase for an employer failing to capture accurately all hours worked.

If faced with a legal challenge over pay issues, the fact that you did not know you had a problem likely will not insulate your company (and maybe you) from liability. Given the potential negative consequences for non-compliance, taking steps to ensure compliance before you have a problem is worth the time and effort.

*For more information contact the author at [tcoffey@laborlawyers.com](mailto:tcoffey@laborlawyers.com) or 404-231-1400.*