

Chicken is a Dangerous Game

By: Julie Rubin

Tyson Foods has egg all over its face. The bad puns and plays on words are in endless supply, so I will try to control the urge. Bottom line is Tyson got slaughtered (woops) by the Third Circuit Court of Appeals just last week for violating the federal Fair Labor Standards Act and Pennsylvania state wage and hour law, because it failed to compensate its poultry workers for time spent donning, doffing, as well as washing, their work gear. If you think this issue has nothing to do with your cubicle city office space. Think again.

Do you ask your assistant to eat lunch at her desk, so she can help you finish that report? Are your employees required to fill out paperwork before they can start the day, or before they go home? Is your staff obligated to read company reports or procedures before answering customer calls? What about that slow computer and the 10 minutes it takes to log on before your employees are up and running? If any of this sounds familiar, you may be risking liability for wage and hour violations – even a class action.

Since as early as 2004, the Department of Labor has publicly announced its intention to focus more attention on “off-the-clock” overtime violations. “Off-the-clock” work refers to work employees perform, but for which they are not compensated. What counts as work has been the subject of courtroom debate for many decades. The Supreme Court in its landmark *Tennessee Coal* case of 1944 defined work as “physical or mental exertion (whether burdensome or not) [if it is] controlled or required by the

employer and pursued necessarily and primarily for the benefit of the employer.” Later that same year, the Supreme Court in another landmark employment case, *Armour & Co. v. Wantock*, held that exertion is not, in fact, required for activity to amount to compensable work, because, “an employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for something to happen.” Simply put, if someone is engaged to wait (to remain on call), he must be compensated; if he is merely waiting to be engaged, chances are good that the off-the-clock time is not compensable work. So the heart of the issue focuses on whether the employee doing something primarily for the employer’s benefit and under the employer’s control. If so, it’s compensable work.

A key issue in the off-the-clock inquiry is whether certain activities are so minor, so insubstantial that they don’t amount to compensable work. This is called the “*de minimus*” exception. Case law on this subject is conflicting and spans the gamut, but all courts examine whether an activity is “integral and indispensable” to the “principal activity.” If so – even if the time spent doing it is mere minutes – the safest conclusion is that it is compensable work. If, for example, your employee waits 6 minutes every morning while the computer software awakens from its slumber to start work, but only gets paid based on the number of data entries logged during the day, you may have an off-the-clock work situation. Traditionally, off-the-clock violations have been most noted in food plants, particularly in the meat and poultry industries, where employees are required to wear clothing and gear designed to assure sanitary food treatment conditions. Where employers fail to compensate employees for time spent “donning and doffing” these items, employers run the risk of wage and hour violations – even though these activities may consume mere minutes of the work day.

Each employment situation raises distinct facts that must be subjectively considered when analyzing compliance with wage and hour law, and a close examination is often complex, but there are some basic inquiries and rules of thumb that each employer ought to consider to keep its neck off the off-the-clock chopping block:

- If your employees are required (expressly or by implication) to prepare to start work, but are not paid until work actually starts, you may be in trouble. Consider

whether your employees are required to fill out forms, read reports, log-on a computer system, or don, doff and store certain gear.

- If your assistant is paid based on a 7-hour work day and a 1-hour unpaid lunch break, but she eats at her desk while she types your report or because you're expecting an important call, she is entitled to be paid for that time.

- If your employees are required to post before the "start" of the scheduled work day, compensation is due.

- Are your employees required to attend after- or before-hours training? This may be off-the-clock compensable work.

In light of the DOL's aggressive stance on off-the-clock claims and the megawatt damages available to prevailing employees (back pay and liquidated damages in the amount of double the lost wages), employers ought to pay special attention to avoiding off-the-clock claims. How? Be proactive. Be sure you have an accurate time keeping method and require that employees follow it. Adopt a written policy that prohibits employees from engaging in off-the-clock work (*i.e.*, unauthorized work) and managers and supervisors from asking or implying that employees are required to engage in off-the-clock work. Consider instilling a pre- or post-shift compensation grace period if employees are required to don and doff gear, complete paperwork log-on to computers before work officially starts, or the like. Ideally, work with your managers and employees to get an accurate picture of how much time employees spend at the beginning and end of work days performing these invisible, but time consuming tasks.

These steps may sound tedious, but they're worth it. You don't want to play a game of chicken with the Department of Labor. Just ask Tyson.