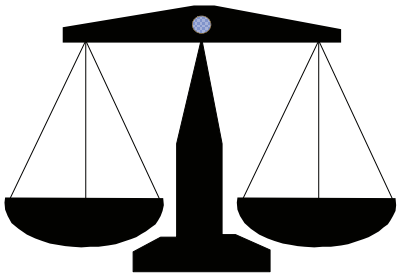

GENERAL COUNSEL CORNER

By Peter H. Gunst, Esquire

This Ain't Chicken Feathers

Tyson Foods has egg all over its face. Tyson got its feathers plucked by the Third Circuit Court of Appeals in a recent decision, *De Ascencio v. Tyson Foods,* 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. Violating such laws is no yolking matter.

Similar claims have been pursued in the service station industry. This May, a federal court in California considered a class action complaint filed by a service station cashier who alleged that she and her fellow employees were routinely deprived of overtime pay because they was forced to work through meal and rests periods. In that case, *Tremblay v. Chevron Stations,* Chevron conceded its uniform policy of not paying additional wages to employees who could not take rest breaks because, for example, the employee was working solo through a graveyard shift.

Since as early as 2004, the Department of Labor has publicly announced its intention to focus more attention on such "off-the-clock" overtime violations.

What qualifies as "off-the-clock" 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 compensable work. So the heart of the issue focuses on whether the employee is acting primarily for the employer's benefit and remains 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.

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 employees are paid based on a 7-hour work day and a 1-hour unpaid lunch break, but actually grab a quick lunch while still working, they are entitled to be paid for the full work period.
- If your employees are required to post before the "start" of the scheduled work day, compensation is due.
- If your employees are required to attend after- or before-hours training, compensation may also be due.

Liability cannot always be avoided through the simple device of naming an employee a "manager," in order to seek exclusion from the reach of federal and state law.

In its 2003 decision in *Jackson v. Go-Tane Services*, the Seventh Circuit Court of Appeals affirmed a judgment entered against a carwash and service station operator who contended that a carwash "manager" was an exempt employee. The court looked closely at the true scope of the employee's responsibilities and duties to conclude that he was, in fact, a covered employee.

The court emphasized that the "manager" had to run his hiring and firing decisions passed his superior, and that the bulk of his working time was actually spent on such non-managerial activities as cleaning the carwash premises, working the cashier and guiding cars through the carwash. As a result, the employer was liable for all statutory damages.

In light of the Department of Labor'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 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.

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