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Pay for Work Performed by Non-Exempt Employees: Does "Hours Worked" Include a Few Extra Minutes?

Working Together

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It appears that the new regulations proposed by the U.S. Department of Labor to increase the salary threshold for exemption from the Fair Labor Standards Act overtime requirements will become effective in the foreseeable future. Currently, any employee earning a salary of more than $455 per week is eligible for classification as exempt, as long as the duties test for exemption can be met. The proposed regulations would raise the threshold to $679 per week, which is $35,308 per year.

Obviously, one consequence of this increase is that some employees formerly classified as exempt because they perform exempt duties will become non-exempt and will have to be paid on an hourly basis, including overtime. Employers are required to keep records of all hours worked, and the wage-hour regulations specify [29 C.F.R. §785.12] that the record-keeping rule is applicable to work performed away from the work premises or job site, including work at home.

However, employees who perform the sorts of administrative, professional or executive duties that qualify for exempt classification don't always stop working when the clock strikes five. In the modern era of texts, e-mails and on-line access, conscientious employees can perform work-related activities practically anywhere at any time, and their employers benefit from their efforts.

When employees are exempt, this extra work can be taken for granted. But time spent working by non-exempt employees must be counted as hours worked if the employer knows or has reason to know that the work is being performed [29 C.F.R. §785.12]. Since it seems likely that more employees will soon be added to the ranks of the non-exempt, this is a good time to review some record-keeping requirements.

First the good news, which is that not every single minute spent by a non-exempt employee after normal work hours in reading e-mails or responding to a text will count as "hours worked." The wage-hour regulations provide that:

"insubstantial or insignificant periods of time beyond the scheduled working hours, which cannot as a practical administrative matter be recorded for payroll purposes, may be disregarded." [29 C.F.R. §785.47]

These bits of time are further described as uncertain and indefinite periods involving a few seconds or minutes duration, where failure to record time is justified by business realities. The Supreme Court has referred to such bits of time as "de minimis," meaning too trivial or minor for consideration.

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But now the caveat, which is that an employer may not make an arbitrary policy to discount even small amounts of time if there is a fixed expectation that the work will done as part of regularly assigned duties. For example, if the employer requires an employee to review after-hours e-mails in preparation for the next workday, and a few minutes spent each evening can aggregate to a measurable amount of work each week, the regulations indicate that the time should be recorded and paid.

At the least, employers should have an explicit policy describing when after-hours work is allowed and when it is prohibited. However, promulgating a rule is not sufficient. Work rules on the authorization of work (including overtime) must be enforced, by discipline if necessary. The regulations state that an employer cannot accept the benefits of work without compensating for them.

Tags: Fair Labor Standards Act (FLSA), Overtime, U.S. Department of Labor