

**CAUTION: EMPLOYERS COULD BE LIABLE FOR FAILING
TO PAY EMPLOYEES WHO RESPOND TO WORK-RELATED CALLS ON THEIR
CELL PHONES AFTER HOURS**

Recently, two notable federal lawsuits were initiated by employees to address whether hourly workers must be paid for responding to work-related cell phone calls and e-mails while off the clock. The outcome of these cases will be important to employers because it is not clear under current law whether employers are required to pay employees to answer work-related calls after hours.

The federal Fair Labor Standards Act (FLSA) mandates minimum wage and overtime requirements for covered workers. Under the FLSA mandates, covered employees must be paid for work performed off the clock, even if the work was voluntary. Courts have said that employees must be paid for such activities like putting on and taking off work uniforms and time to boot up computers. Also, federal law provides that workers must be paid for underground travel in mines and walking from the time clock to the work bench. Workers who tried to get paid for driving to and from assignments off company property must demonstrate that their travel is an integral and indispensable part of the principal activities for which the worker are employed. Do these decisions mean that workers must be paid for answering cell phones after work hours? The courts must carefully consider whether these activities form an integral and indispensable part of the principal activities for which these workers are employed.

In considering this issue, an employer may ask: “how is the use of cell phones and e-mails different from the use of pagers?” The Labor Department says that workers do not have to be paid for carrying pagers. However, if a worker carrying a pager is paged so much that the worker cannot use on-call time for “personal pursuits,” they must be paid. Following the logic of the pager cases, it is possible that the courts could find that an hourly employee is only entitled to

compensation for answering cell phones and e-mails off the clock if doing so interferes with the employee's personal pursuits.

In the T-Mobile USA Inc. case filed in the U.S. District Court for the Eastern District of New York, current and former employees brought suit alleging that they were mandated to use company-issued smart phones to respond to work messages after hours without pay. The workers claim that they had to use company-issued smart phones to respond to work-related messages, including customer complaints, after hours without pay. According to the lawsuit, T-Mobile did not pay the workers for their time. The company's reported position is that employees should expect to work extra hours as part of the company's "standard business practices." In the CB Richard Ellis Group, Inc. case, filed in the U.S. District Court for the Eastern District of Wisconsin, a maintenance worker claims that he is entitled to compensation for time spent after hours receiving and responding to messages on a work-issued cell phone. There may be merit to these claims. Notably, a California appeals court recently decided that employees of a medical-technology provider Lincare, Inc. may pursue their lawsuit for compensation for time spent answering customer questions by phone while on call.

These recent lawsuits demonstrate that disputes concerning the definition of "work" are increasing as technology advances. With the convenience and easy access to cell phones, e-mail communication and other electronic devices, many employers will encounter this uncertain area. Until there is clear guidance on how to manage these types of situations, employers are well advised to have clear policies in place that are communicated to the employees that regulate the use of smart phones, cell phones, e-mail communications and other electronic devices, which tend to add convenience to our everyday lives, but in turn create a blurry line when an employer is faced with the question of whether the employee is entitled to compensation for his or her

responses to work related communications. Employers are also advised to contact workers as little as possible on cell phones, smart phones and e-mail and make sure that their employees are paid for responding.

If you have any questions about compensation for employee work-related cell phone or pager use, or any employment law-related questions, you may contact me at 1-877-LAW-2555.

Debra R. Mehaffie
Attorney-At-Law
Scaringi & Scaringi, P.C.