Smartphones: Increasing Productivity, Creating Overtime Liability

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I. INTRODUCTION

Advancements in technology are blurring the line between work time and leisure time, creating what has been termed “weisure time.” Experts say this mixture of work and leisure causes more Americans to use technology to stay connected and work while away from the office, for example checking e-mails while attending a child’s sporting event. Society has recognized the problems this creates for employees and their families. However, these advancements also create problems for employers because the Fair Labor Standards Act (FLSA) only defines compensation requirements for work time, not for “weisure time.”

One piece of technology at the heart of this “weisure time” is the smartphone. Although there is no standard definition, the term smartphone typically refers to a mobile phone enhanced with computer technology, including e-mail, internet access, and the ability to create and edit documents. Such a technological advance is enticing for both employers and employees. Employers view smartphones as a way to always be able to contact employees, to increase worker productivity, and in some situations to improve customer service by keeping employees accessible and able to respond to customer problems or concerns. Employees also see advantages from the technology, finding it gives them flexibility by allowing them the freedom to get away from the office and still stay connected. As workers move up the corporate ladder, the availability and flexibility offered by a smartphone often becomes essential—if not required—for the job. However, as smartphones become increasingly affordable and more popular, more and more Americans—not just salaried corporate executives—are joining the smartphone trend. While some employees have phones from their employer for business use, others are getting smartphones for their own personal use. When hourly employees check their

2. Id.
7. Patterson, supra note 1.
8. Id.
work e-mails from personal smartphones, many wonder if such time is compensable.\textsuperscript{9} Compensation issues like this become increasingly significant in a struggling economy. As employers are looking to cut costs—including labor costs—while still maintaining productivity, employees are competing with coworkers to retain their positions and are looking to receive adequate compensation for such work.\textsuperscript{10} Additionally, former employees who have not found other work due to the high unemployment rates are more likely to bring claims now that they may not otherwise have brought.\textsuperscript{11}

This Note examines the FLSA and its application to time employees spend using smartphones. Specifically, Part II examines the FLSA, its overtime coverage for certain employees, and the basic definitions laid out in the FLSA. Part III analyzes the varying applications of those definitions by courts regarding: voluntary overtime, what makes time compensable, on-call time, and de minimis time. Finally, Part IV explains the changes Congress and the Department of Labor need to make to clarify the act, and what employers can do in the meantime to protect themselves from overtime claims by employees using smartphones outside of work without the employer’s permission.

II. BACKGROUND

Wage and hour regulation is likely “the oldest form[ ] of workplace regulation in the United States.”\textsuperscript{12} The federal government has directly regulated wages and hours since colonial times.\textsuperscript{13} In 1630, Massachusetts set a wage cap for certain craftsmen because the shortage of skilled workers had caused wages to rise to a level nearly double what similar workers were earning in England.\textsuperscript{14} Starting in the early 19th century, workers were concerned with the number of hours they were required to work and pressured employers to limit hours.\textsuperscript{15} During and following the Depression, unemployment was widespread and the high demand for such a limited number of jobs resulted in low pay for the few workers who could find employment.\textsuperscript{16} As a result of the Depression, Congress saw the need for wage regulation to protect the standard of living for employees and their families and for hour regulation to spread the work among more employees.\textsuperscript{17}

A. Purpose and Enactment of the FLSA

Prior to enacting the FLSA, debates about wage and hour regulation in Congress during the 1937–1938 session focused on the economic implications for both employers and employees.\textsuperscript{18} One supporter argued that legislation covering wages and hours would stop employers from cutting the wages of the defenseless workers who already had poor

\begin{footnotes}
10. See Rothe, supra note 3, at 715 (stating that in times of high unemployment fear of losing one’s job to another who is willing to work the extra hours is widespread).
14. Id.
15. SMITH ET AL., supra note 12, § 5.1.1.
16. ROTHSTEIN & LIEBMAN, supra note 13, at 393.
17. Id. at 393–94.
\end{footnotes}
living conditions. On the other hand, a challenger of the bill argued that the bill would not increase employment and living standards, but would result in factories closing and going into bankruptcy from the higher wages. Nevertheless, Congress enacted the FLSA in 1938 to correct and eliminate working conditions that Congress found to be “detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers”; conditions that burdened commerce, lead to labor disputes, and constituted an unfair method of competition.

B. The Portal-to-Portal Act

In 1947, Congress passed the Portal-to-Portal Act to clarify overtime compensation for activities considered “preliminary” or “postliminary” to the principal work activity. The Portal-to-Portal Act excludes certain activities from the FLSA provisions, meaning the employer is not required to compensate employees for time spent walking or traveling to or from the location of the employee’s principal work activity, or for “activities which are preliminary to or postliminary to said principal activity.” The Supreme Court resolved a circuit split regarding this act in IBP, Inc. v. Alvarez. The Court held that any activity that is “integral and indispensible” to performing a “principal activity” is also a principal activity, and so long as it is performed during a continuous workday, the activity is covered by the FLSA and compensable. The Court further clarified that just because certain pre-shift activities were necessary did not make those activities integral and indispensable.

C. Coverage Under the FLSA

First and foremost, the FLSA only covers an employer–employee relationship. Independent contractors, undocumented workers, and children under certain ages are not considered employees and therefore are not covered under the FLSA. Originally, the FLSA determined coverage based solely on the activities of the individual employee, but an amendment in 1961 added enterprise coverage. Under enterprise coverage, if a

19. Id. at 4.
20. Id.
22. Id. §§ 251–256.
25. IBP, Inc. v. Alvarez, 546 U.S. 21 (2005). The Ninth Circuit had held that time spent walking after putting on protective gear was compensable, while the First Circuit had held such time was not compensable. Id. at 24.
26. Id. at 37.
27. Id. at 40. The court held that time spent waiting to put on the first piece of safety equipment was excluded from the FLSA. Id. at 41. Once the employee put on the first piece of equipment, the Portal-to-Portal Act no longer applied. Thus, the time walking to the work station after putting on the equipment and walking from the work station prior to removing the equipment was compensable under the FLSA. Id. at 30.
28. See 29 U.S.C. §§ 206(a), 207(a) (providing minimum wage and maximum hours provisions for “employees”).
29. See generally SMITH ET AL., supra note 12, § 1 (defining the employment relationship and determining who is an employee).
30. LES A. SCHNEIDER & J. LARRY STINE, WAGE AND HOUR LAW: COMPLIANCE & PRACTICE § 4:19
business is a covered “enterprise,” then every employee is covered by the FLSA regardless of the individual employee’s activities, saving the employer from individually reviewing each employee’s duties.31 Many employers are covered as a “dollar-test enterprise” if the employer has at least one worker whose activities deal with or affect interstate commerce and the business has yearly gross sales of at least $500,000.32 The FLSA language discussing commerce is so broad that most employers deal with or affect interstate commerce for the purposes of the statute.33 Even if the employer is not a covered enterprise, an individual employee may still be covered under individual coverage if the employee is himself “engaged in commerce or in the production of goods for commerce.”34

D. White-Collar Exemption Under the FLSA

Certain industries and employees may be exempt from provisions of the FLSA even though the workers are considered “employees” and “covered.” Most significant for this Note is the white-collar exemption, which classifies any employee in a “bona fide executive, administrative, or professional capacity” as exempt from minimum wage and overtime provisions.35 Employees in executive, administrative, and professional capacities will be exempt if the employee’s salary and duties meet the requirements for one of the classifications; an exemption is not based on title alone.36 The employer bears the burden of proving that the employee qualifies for the exemption.37

One of the most common misconceptions about exemptions is that if a worker is paid on a salary basis, as opposed to an hourly basis, he is exempt from overtime.38 Although required for the white-collar exemption, the fact that an employee is paid on a salary basis is not sufficient for the employer to claim the exemption; the employee must also meet a minimum salary level and perform certain duties to qualify.39 Similarly, a non-exempt employee may be paid on a salary basis, but must still receive at least one and one-half times the regular rate for any hours worked over 40 in a workweek.40

1. Salary Test

The required minimum salary for the white-collar exemption is $455 per week ($23,600 annually).41 An employee is considered paid on a salary basis if the employee regularly receives the same amount each week and such amount is not subject to

(2009) [hereinafter WAGE AND HOUR LAW].
32. Id. This Note will assume the employer is covered as an enterprise under the FLSA. For a more detailed analysis of enterprise coverage, including how to calculate gross sales, see generally MASTER GUIDE ¶ 205.
35. Id. § 213(a)(1). For more exemptions, see generally 29 U.S.C. § 213.
36. MASTER GUIDE, supra note 31, ¶ 302.
37. ATHey, supra note 33, at 58.
38. WAGE AND HOUR LAW, supra note 30, § 10:01.
39. ATHey, supra note 33, at 36, 39–44.
40. WAGE AND HOUR LAW, supra note 30, § 10:01.
41. 29 C.F.R. § 541.600(a) (2009).
reductions for the actual number of hours or days worked or for the quality of work performed. Professional and administrative employees may receive compensation on a fee basis and retain the exemption so long as the pay for the week would be at least $455 if the employee worked 40 hours.

2. Duties Test

In addition to meeting the salary requirement, the employee’s primary duties must fit in one of the exempt categories, or a combination of the categories. The duty requirements vary for each category. To qualify as an exempt executive, the employee’s primary duty must be management; meaning the employee must regularly supervise two or more employees and have authority or input in hiring and firing decisions. An administrative employee whose primary duty is office or non-manual work related to the general business operations qualifies for the administrative exemption if he has discretion and judgment on matters of significance. A professional employee qualifies for the exemption if his primary duty requires either knowledge acquired through an extended course of specialized study or the use of creativity, talent, or originality.

E. Defining Work

The FLSA defines an employee as “any individual employed by an employer.” An employer is “any person acting directly or indirectly in the interest of an employer in relation to an employee.” Employ is defined as “to suffer or permit to work.” In an attempt to elaborate on these definitions, the Supreme Court has interpreted work to include all time either required or controlled by the employer, primarily for the employer’s benefit, which requires “physical or mental exertion (whether burdensome or not).”

F. Overtime Provisions

An employer must compensate a covered employee for any hours worked over 40 in one workweek at a rate not less than one and one-half times the employee’s regular rate of pay. The workweek must be seven consecutive days of 24 hours each, but need not coincide with the calendar week. The employer must pay the overtime on the same day as the regular pay.

42. Id. § 541.602(a).
43. Id. § 541.605. A fee basis means “the employee is paid an agreed sum for a single job regardless of the time required for its completion.” Id. For example, an artist who received $250 for a painting that took 20 hours to complete, would be exempt under these regulations because, had he worked 40 hours, he would have received $500, and $500 exceeds the $455 minimum requirements. Id.
44. ATHEY, supra note 33, at 39.
45. 29 C.F.R. § 541.100.
46. Id. § 541.200.
47. Id. § 541.300. This Note will assume the workers are non-exempt.
49. Id. § 203(d).
50. Id. § 203(g).
52. 29 U.S.C. § 207(a)(1).
53. MASTER GUIDE, supra note 31, ¶ 801.
payday as regular wages for the workweek in which the employee worked the overtime.54

Although the FLSA requires the payment of overtime for hours over 40, the FLSA does not limit the number of hours or the number of days an employee may work in a given week,55 nor does the FLSA require higher rates for weekends or holidays.56 However, if a contract or collective bargaining agreement contains provisions for higher wages, the employer must pay the wage agreed upon in such contract or agreement.57

G. Damages and Remedies for Violations

The FLSA allows either an employee or the Secretary of Labor to bring legal action against an employer for violating the overtime provisions of the FLSA.58 An employee may bring action on behalf of himself or on behalf of himself and other similarly situated employees.59 If the Secretary of Labor brings an action against an employer, an employee may no longer bring such action.60 Any recovery by the Secretary will be paid to the affected employees.61

Failing to comply with the FLSA can have substantial consequences for employers, including damages for twice the amount of the unpaid overtime.62 An employer may recover back wages for unpaid overtime, attorney fees, court costs, and an additional amount of liquidated damages equal to the unpaid wages.63 If the employer shows he acted in good faith and reasonably believed his acts were not in violation, the court may choose not to award liquidated damages.64 In addition, an employer is subject to fines of up to $10,000 for willful violations, and in the case of a repeated violation, the employer is also subject to up to six months imprisonment.65

It is important for managers to realize that individuals are often held personally liable for FLSA violations.66 The FLSA defines an employer as “any person acting directly or indirectly in the interest of an employer in relation to an employee.”67 The First Circuit has held this definition can include corporate officers with “operational control,” which is considered to include control over hiring, firing, and setting terms and conditions of employment that will often influence the violation of the FLSA.68 The company and the individual acting on behalf of the company are jointly and severally

54. Id.
55. Rothstein & Liebman, supra note 13, at 397. Separate provisions of the FLSA deal with child labor and limit hours for those under the age of 18. This Note refers to workers over the age of 18.
57. Id.
58. 29 U.S.C. § 216(b) (2006) (creating cause of action for employees); Id. § 216(c) (granting the Secretary of Labor the right to bring an action).
59. Id. § 216(b).
60. Id. § 216(c).
61. Id.
62. Athey, supra note 33, at 1.
63. 29 U.S.C. § 216(b).
64. Id. § 260.
65. Id. § 216(a). This Note will only consider non-willful violations.
68. Chao v. Hotel Oasis, Inc., 493 F.3d 26, 34 (1st Cir. 2007).
liable.\textsuperscript{69} An employer can face expensive consequences for failing to comply with the overtime provisions of the FLSA.\textsuperscript{70} Employers are particularly vulnerable to these stiff consequences when the employer is aware he must pay employees for overtime, but he may not be aware an employee has worked more than 40 hours. Calculating the number of hours an employee works is rather straightforward when the employee’s working time is easily identifiable—such as when he is performing a principal duty, assigned by the employer, at his place of employment, and during normal working hours.\textsuperscript{71} Difficulty arises when employees perform tasks outside of normal working hours and away from the usual job site, making it unclear when they are “working.”\textsuperscript{72} Smartphones are making this kind of work more common. As a result, this Note will analyze the effects of smartphones on an employer’s overtime liability for non-exempt employees under the FLSA.

III. ANALYSIS

With the increased use of smartphones by non-exempt employees, some employers find themselves faced with lawsuits for overtime wages.\textsuperscript{73} All employers need to be aware of the FLSA regulations regarding compensation and overtime to avoid similar litigation.\textsuperscript{74} This Part will demonstrate that the FLSA does not provide clear definitions or rules regarding compensable time, thus courts have created totality of the circumstances tests that provide little guidance for employers attempting to apply the FLSA to new technologies like smartphones. To provide guidance to employers, either Congress should amend the FLSA to clarify these provisions, or the Department of Labor (DOL) should enact new regulations to address applying the FLSA to new and emerging technologies.

The FLSA does not provide guidance on defining “compensable time.”\textsuperscript{75} Since the FLSA was enacted, courts—and consequently employers—have struggled to adapt the FLSA to changing work conditions, including the unforeseen introduction of smartphones to the workplace.\textsuperscript{76} In analyzing if time spent checking e-mails on a smartphone is compensable, an employer should look at issues regarding voluntary work, on-call time, and de minimis time.\textsuperscript{77}

\textsuperscript{69} Wage and Hour Law, supra note 30, § 21:13.
\textsuperscript{70} See supra text accompanying notes 62–65 (describing the damages for violations).
\textsuperscript{71} Smith et al., supra note 12, § 5.1.2.4.
\textsuperscript{72} Id.
\textsuperscript{73} Devora L. Lindeman, Beware the BlackBerry in Non-Exempt Hands, Overtime Advisor (Aug. 5, 2009), http://www.overtimeadvisor.com/tags/tmobile.
\textsuperscript{74} Id.
\textsuperscript{75} Smith et al., supra note 12, § 5.1.2.4.1.
\textsuperscript{76} Minehan, supra note 11; see also Loren Schwartz, Comment, Reforming the Fair Labor Standards Act: Recognizing On-Call Time as a Distinct Category of Compensable Work, 40 U.S.F. L. Rev. 217, 236 (2005) (arguing for Congress to amend the FLSA to address emerging issues, particularly on-call time).
\textsuperscript{77} See Schlossberg & Malerba, supra note 5 (discussing on-call time and de minimis activity as applied to technological advances); see also Athey, supra note 33, at 49–51 (discussing unauthorized overtime).
A. Voluntary Work

Under the FLSA, an employer must compensate an employee for work performed, regardless of any agreement to the contrary between the employer and employee. Justifiably, when the employer has a clear policy stating a certain activity is not required, employers argue they should not be required to compensate employees for voluntarily participating in such activity. For example, city firefighters who freely volunteered for a private rescue squad—knowing it was not part of their job requirements as firefighters—years later claimed that the city, as their employer, owed them overtime compensation for the time they volunteered. Although the court held the firefighters in that case were not entitled to compensation, such suits cause a real and understandable concern for many employers.

On the other hand, the First Circuit in Republican Publishing Co. v. American Newspaper Guild quickly dismissed the employer’s claim that if an employee’s work was voluntary it did not require compensation. The court noted that the FLSA defines “employ” as “suffer or permit to work”; therefore, the question was whether the employee was performing activities for the benefit of the employer, not whether the work was voluntary. In Republican Publishing, the employee was a theater editor writing reviews for movies and plays, and sought compensation for the hours she spent at theaters seeing the shows. The employer argued the employee knew such time would not be compensated, and her voluntarily doing the activity should not require compensation. The court held that regardless of any custom or understanding, whether or not the work was voluntary was not decisive when the employee’s attendance at the plays was necessary to the job and for the primary benefit of the employer.

Although the fact that an activity was voluntary is not decisive, courts have considered it when the employer had little control over the activity; the activity was not required or necessary to the job; and the employer was not the primary beneficiary. Employees at Northwest Fabrics and Crafts had the option to sew garments outside of work to put on display in the store with the understanding they would not be compensated. In reversing the lower court’s grant of summary judgment against the company, the Eighth Circuit noted the Secretary of Labor failed to show control by the employer—a necessary element when the work is not required—and also failed to show that the employer was the primary beneficiary. Thus, even if there is an understanding,
custom, or contract for an employee not to be compensated for certain work, the “crucial question is . . . whether the [employee] was in fact performing services for the benefit of the employer with the knowledge and approval of the employer.”

When considering who is the primary beneficiary, an employee checking e-mails from a smartphone likely falls in between these two cases. Occasionally, it may be for the benefit of the employer to have the employee available to respond to messages outside of work hours or when away from the office. However, there are often times when having the smartphone capability is primarily for the benefit and convenience of the employee, not the employer. It is also difficult to determine if the work was required at that exact time or if the work could wait until the next day at the office. Without a clear line as to who is benefiting or if the work is required, the determination of the primary beneficiary will be an issue of fact for the court to decide based on the totality of the circumstances, giving the employer little guidance. Ideally, courts should give weight to an employer’s policy regarding overtime in considering the circumstances, which may show whether or not the employer requested or required the work.

B. Policies Against Overtime

According to the DOL, merely having a policy against allowing employees to work overtime is not enough to protect employers from liability. Even if an employer does not request the overtime, or does not want an employee to work the overtime, so long as an employer has knowledge of the work, he “has a duty to make every effort to prevent its performance.”

The DOL position raises multiple issues. How does the court decide if the employer had sufficient “knowledge” of the work? What is included in the employer’s “duty” to stop such work if it is not desired? What if the employer approved the overtime work, but the employee spent longer than necessary to complete the task?

1. Knowledge of the Time Worked

When an employee performs work away from the job site, including at home, the employer must count that time as hours worked so long as the employer knows or has reason to believe the work is being performed. Thus, an employer must have

91. Republican, 172 F.2d at 945.
93. See, e.g., id. (discussing how advances in technology make it easier for an employee to work from home when, for example, a child is sick).
94. See ConAgra II, 987 F.2d at 1362 (remanding to determine issues of fact regarding control and primary beneficiary).
95. 29 C.F.R. § 785.13 (2009).
96. Id.; Chao v. Gotham Registry, Inc., 514 F.3d 280, 288 (2d Cir. 2008).
98. 29 C.F.R. § 785.12.
“knowledge” that an employee has performed work. The employer must have either actual knowledge or constructive knowledge—the opportunity to acquire the knowledge through reasonable diligence.

Forrester v. Roth’s I.G.A. Foodliner, Inc. is an unambiguous case in which the employee intentionally prevented the employer from acquiring knowledge by never informing the employer of the hours of overtime worked without pay. The court held that an employer without knowledge of the overtime worked did not “suffer or permit” the employee to work, and therefore was not liable for unpaid overtime under the FLSA.

The purpose of the knowledge requirement is to give the employer an opportunity to comply with the FLSA, but courts have construed the requirement broadly to include not only actual knowledge but also constructive knowledge if the employer “should have known” the employee was working overtime. For work performed away from the office or job site, the DOL requires compensation if the employer “has reason to believe that the work is being performed . . . .” If the employer has no knowledge of the work, and the employee does not notify the employer, the employer does not violate the FLSA in failing to pay overtime. However, as the following case shows, courts often impute knowledge.

In Chao v. Gotham Registry, the employer claimed he was unaware of the overtime hours worked offsite until after the employee actually worked the overtime, and therefore the employer claimed he did not have the opportunity to comply with the FLSA. The court rejected that argument, stating that it is not necessary for the employer’s knowledge to “arise concurrently with the performance of overtime . . . .” The court justified its holding by citing a regulation extending the “suffer or permit to work” standard to work performed offsite and giving an example of a K-9 officer caring for the police dog at home. The regulation makes clear that work performed at home is not exempt merely because it is away from the job site, but the illustration given by the court does not clarify exactly how the court found knowledge by the employer. The court used an example that concurrent knowledge would require a K-9 officer to report to a supervisor each time he grooms his dog. However, the case of a K-9 officer working overtime can be distinguished. Cases dealing with overtime claims by a K-9 officer concede the supervisor has knowledge the officer will perform the overtime in

99. Id.
102. Id.
103. Id.
104. Id.
106. Forrester, 646 F.2d at 414.
108. Id. at 287.
109. Id. at 287–89.
110. 29 C.F.R. § 785.12.
111. Gotham, 514 F.3d at 287.
112. Id.
caring for the dog, but the employer may be unaware of the exact details of the work.\footnote{Holzapfel v. Newburgh, 145 F.3d 516, 520 (2d Cir. 1998) (stating standard operating procedure was for the officer to be responsible for all care and maintenance of the dog).} On the other hand, in Gotham the employer was a staffing agency and was not allowed to go on hospital premises to monitor the nurses’ hours.\footnote{Gotham, 514 F.3d at 283.} Gotham paid overtime to the nurses who followed company policy and received prior approval for their overtime but objected to having knowledge of the overtime by nurses who did not request prior approval.\footnote{Id. at 284, 287.}

The “should have known” standard offers no guidance for an employer. In Reich v. Department of Conservation and Natural Resources,\footnote{Reich v. Dep’t of Conservation and Natural Res., 28 F.3d 1076 (11th Cir. 1994).} even when the employees worked independently such that the employer relied on their reports of hours worked, and the employees did not report their overtime hours, the court found the employer was liable under the “should have known” standard.\footnote{See id. at 1079, 1083–84 (stating a government study in which employees stated they worked in excess of 40 hours but falsified their weekly hours reports would have led to actual knowledge had the employer exercised reasonable diligence).} The lower court had held that although the Department was aware of the allegations of unreported overtime and that they could have confirmed or denied the allegations by comparing the hours reports to weekly reports, such review was unreasonable considering the large total number of reports and the small number that were incorrect.\footnote{Id. at 1081.} Thus, the lower court held that the employer did not have knowledge.\footnote{Id.} The Eleventh Circuit reversed, holding that the Department could have acquired knowledge through reasonable diligence and was liable under the “should have known” standard.\footnote{Id. at 1084. The court in Debose cited Department of Conservation and discussed the “should have known” standard, but did not need to apply the test because the plaintiffs failed to prove they worked any overtime for which they were not paid. Debose v. Broward Health, No. 08-61411-CV, 2009 WL 4884535 (S.D. Fla. Dec. 17, 2009).}

The issue of knowledge is another question of fact to be determined in each case.\footnote{See supra Part II.G (detailing personal liability for certain managers with the appropriate level of control).} If an employer gives an employee a smartphone with e-mail capabilities, it is unclear if a court would consider this knowledge that the employee is working overtime. If the employee responds directly to a superior in management, this probably constitutes knowledge by the employer.\footnote{See Dept’ of Conservation, 28 F.3d at 1083 (stating that knowledge of overtime violations is an issue of “ultimate fact”).} On the other hand, if lower level employees are exchanging e-mails among themselves, it seems likely an employer may be completely unaware of such activities. For a large employer, checking all the e-mail records for each employee seems unreasonable, similar to what the lower court determined in Department of Conservation.\footnote{See Dept’ of Conservation, 28 F.3d at 1081 (stating the district court found it unreasonable to impute knowledge based on the large volume of records and the few incorrect reports).} It also seems unreasonable under the Eleventh Circuit’s standard to presume the employer “should have known” because he could have acquired knowledge
through reasonable diligence.\textsuperscript{124}

### 2. Employer Duty to Prevent Unwanted Work

The federal regulations state “it is the duty of the management to exercise its control and see that the work is not performed” if the employer does not want an employee to perform such work.\textsuperscript{125} The employer may not merely state a rule against overtime and continue to accept the benefits of the work without compensating the employee, but rather management must make every effort to enforce the rule.\textsuperscript{126}

In \textit{Department of Conservation},\textsuperscript{127} the Eleventh Circuit rejected the Department’s claim that because of the extent and circumstances of the business, the Department could not reasonably monitor each employee’s hours and overtime.\textsuperscript{128} The Department had a clear policy prohibiting employees from working overtime and the supervisors were to ensure compliance.\textsuperscript{129} The supervisors informed the employees they were to report to the central office if they could not complete their work during their scheduled 40 hours.\textsuperscript{130} Despite the opportunity to request overtime, many employees did not request overtime but instead falsified their weekly time reports to report only 40 hours per week regardless of the number of hours worked.\textsuperscript{131} The Eleventh Circuit found knowledge based on the results of a government study in which employees reported working over 40 hours and falsifying their time reports.\textsuperscript{132} However, the court also stated it would “impute” the Department with knowledge.\textsuperscript{133} In finding liability, the court also noted there was no indication the Department ever disciplined a worker for violating the no overtime policy.\textsuperscript{134}

\textit{Department of Conservation} is unclear as to how the court found knowledge, but indicates that the duty of the employer goes beyond implementing a policy prohibiting overtime and instructing management to closely monitor the employees, even for an employer with a large number of employees working away from the office at irregular hours.\textsuperscript{135} However, the court specifically drew attention to the fact that the employer had never disciplined an employee for violating the overtime policy, which suggests an employer who did enforce the rule could satisfy the duty.\textsuperscript{136} In \textit{Debose v. Broward Health},\textsuperscript{137} the court distinguished \textit{Department of Conservation} in noting that the employer in \textit{Debose} had formally disciplined workers who violated the overtime

\begin{footnotes}
\item[124] The court did not clearly state how the employer should have known of the overtime. See generally id.
\item[125] 29 C.F.R. § 785.13 (2009).
\item[126] Id.
\item[127] \textit{Dep’t of Conservation}, 28 F.3d at 1076.
\item[128] Id. at 1081–82.
\item[129] Id. at 1079–80.
\item[130] Id. at 1081.
\item[131] Id. at 1080.
\item[132] \textit{Dep’t of Conservation}, 28 F.3d at 1083.
\item[133] See id. (stating “the Department had actual knowledge” and then stating that “the district court erred as a matter of law by failing to impute” knowledge).
\item[134] Id. The case was remanded to determine damages. Id. at 1084.
\item[135] Id.
\item[136] Id. at 1083.
\end{footnotes}
provisions. Consequently, any employer with a policy against overtime should strictly enforce such policy.

3. How Much Time Is Required?

An employer looking to reduce costs often looks to reduce labor costs, including reducing overtime. Reducing labor costs may be difficult when employers find certain employees continue to work longer than the employer feels is necessary to complete the task. Even though some employees may be able to complete the work in 40 hours, this is not enough to relieve the employer of the responsibility to ensure that other employees are not working overtime.

In Holzapfel, the Second Circuit was concerned that “[o]ver-zealous employees could cause unintended bankruptcies” if an employer was required to pay for all overtime when such time was not required. A rule requiring overtime pay for all hours worked by a K-9 officer caring for the dog was against common sense because at some point, the time spent caring for the dog was no longer for the employer’s benefit but out of the employee’s affection for the dog. The lower court’s jury instruction stated that an employee is only entitled to overtime compensation for work that is “reasonably necessary” to fulfill the employee’s duties. In reversing, the Second Circuit noted that even when work is not “reasonably required” the employee may still feel pressured or compelled to do the work by the employer. Instead, the court suggested the jury consider the typical definition of work—whether the employer controlled or required the time, and if it was “necessarily and primarily” for the benefit of the employer. If the employer did not require or control the time and the benefit was primarily for the employee, including for his own satisfaction, such time was not compensable.

In stating the “controlled or required” standard in Holzapfel, the court addressed pressure by an employer, but that analysis did not extend to pressures an employee may feel from other sources. Many employees would likely say they feel pressured to check e-mails while away from the office, but these feelings may be caused by societal pressure as opposed to pressure by the employer. The pressure could also come from other

138. Id. at *12. The employees failed to demonstrate Broward had actual or constructive knowledge of unpaid overtime. Id. at *11.
140. See Holzapfel v. Newburgh, 145 F.3d 516, 523, 528 (2d Cir. 1998) (discussing and ultimately rejecting a standard of reasonableness in how much time a task should take).
141. Dep’t of Conservation, 28 F.3d at 1083.
142. Holzapfel, 145 F.3d at 527.
143. Id. at 523.
144. See id. at 520, 523 (reversing and remanding to determine whether the K-9 officer’s time caring for the dog was out of his devotion to the animal or for the primary benefit of the employer).
145. Id. at 524.
146. Id. at 523. See supra Part II.E (defining work).
147. Holzapfel, 145 F.3d at 523.
employees within the same company. For example, the partners at one law firm not only pressured employees, but also told employees they had smartphones for a reason and they should all be checking their e-mails every hour, even when not at work. A partner at the firm put the message in an e-mail to all attorneys, stating the reason for the instruction was competition in the economy and client expectations that attorneys would be accessible at all times because of advances in technology. Although attorneys are exempt from the FLSA overtime requirements under the white-collar exemption, this highlights the general work environment of society today. As another illustration of the pressure in many work environments, a complaint filed July 19, 2009 alleged that T-Mobile issued the non-exempt employee–plaintiff’s company smartphones and required them to respond to e-mails and text messages at all hours, including when they were not clocked-in. According to the complaint, T-Mobile required the response, which seems to fit the Holzapfel “controlled or required” standard. However, if an employee is checking e-mails on smartphones because of the societal pressure to stay connected, it could be for the employee’s own satisfaction and not for the employer’s benefit, and the time should not be compensable. It seems the holding in Holzapfel only addressed pressure by the employer, and not pressure by society or the general work environment.

C. On-Call Time

Certain jobs require an employee to be on call outside of normal working hours, such as emergency response technicians, utility workers, and mechanics. Whether or not this type of on-call time is compensable depends on whether the time is for the benefit of the employer or the employee, and whether the employee can use the time for personal activities. When an employee is relieved of duties and can make effective use of the time for personal activities, the employee is considered “waiting to be engaged”

151. Id.
152. See supra Part II.D on exemptions to the FLSA.
154. See supra notes 145–47 and accompanying text (discussing the primary beneficiary of work and societal pressure to stay connected).
155. WAGE AND HOUR LAW, supra note 30, § 6:35.
156. ATHEY, supra note 33, at 25.
and not entitled to compensation.\textsuperscript{159} Waiting to be engaged applies to a situation like a coroner who must respond to calls occasionally but is generally free to pursue personal activities while on call.\textsuperscript{160} On the other hand, an employee is “engaged to wait“ and must be compensated when he is unable to use the time for personal use.\textsuperscript{161} An example of time spent engaged to wait would be a firefighter at the station, watching television or playing cards while waiting for an alarm.\textsuperscript{162} With the increasing use of smartphones, employees are claiming that receiving e-mails or calls outside of work benefits the employer and is so restrictive that they are “engaged to wait” and should be compensated for their time on call.\textsuperscript{163}

The development of smartphone technology follows the trend of beepers in the 1970s and mobile phones in the 1980s.\textsuperscript{164} All these devices allow employers to easily contact off-duty employees, giving employees more freedom if they are on call and making it more likely they could use the time for personal activities.\textsuperscript{165} Initially with a pager—and now with a smartphone—employees like plumbers, heating and cooling technicians, and even police officers who need to be on call can now leave home and do many activities while still available for the employer to contact them.\textsuperscript{166} Employers see this as an opportunity to have workers available if needed, but only compensate them if they do in fact need them to work.\textsuperscript{167} The line between “engaged to wait” and “waiting to be engaged” is vague and provides little guidance for an employer to determine how a court will apply the standard.\textsuperscript{168}

In analyzing on-call time, the Ninth Circuit considers a number of factors, including: whether there was a restrictive fixed time limit for response, whether the frequency of contact was “unduly restrictive,” and whether the employee actually engaged in personal activities during the on-call time.\textsuperscript{169} No factor is dispositive, thus the analysis provides little guidance when some factors weigh in favor of the employer but others weigh in favor of the employee.\textsuperscript{170} With the portability of smartphones, the employee can engage in many personal activities. However, the frequency of contact may become unduly restrictive, particularly if there is a required response time.\textsuperscript{171} Some employers argue that even though the employee is connected through the smartphone, he is still free to engage in personal activities, and then such time is likely not work.\textsuperscript{172} However, employees

\begin{thebibliography}{100}
\bibitem{159} Skidmore v. Swift & Co., 323 U.S. 134, 137 (1944); \textsc{Athey}, supra note 33, at 25.
\bibitem{160} \textsc{Athey}, supra note 33, at 26.
\bibitem{161} \textsc{Swift}, 323 U.S. at 138; \textsc{Athey}, supra note 33, at 25.
\bibitem{162} \textsc{Athey}, supra note 33, at 25.
\bibitem{163} \textsc{Troutman & Urban}, supra note 6.
\bibitem{164} \textsc{Schwartz}, supra note 76, at 220.
\bibitem{165} \textsc{Wage and Hour Law}, supra note 30, § 6:35; \textsc{Schwartz}, supra note 76, at 220.
\bibitem{167} \textsc{Schwartz}, supra note 76, at 220.
\bibitem{168} \textit{Id.} at 224.
\bibitem{169} Owens v. Local No. 169, 971 F.2d 347, 351 (9th Cir. 1992). The other factors considered by the Ninth Circuit are not applicable to this Note. The Supreme Court has not addressed an on-call dispute since creating the distinction between “waiting to be engaged” and “engaged to wait.” \textsc{Schwartz}, supra note 76, at 223.
\bibitem{170} \textsc{Owens}, 971 F.2d at 351.
\bibitem{171} \textsc{Troutman & Urban}, supra note 6.
\bibitem{172} \textsc{Schlossberg & Malerba}, supra note 5.
\end{thebibliography}
argue that they are constantly tied to the office, \(^{173}\) that they are so restricted that they are “engaged to wait,” and that they should be compensated.

The problem with on-call time is that under the FLSA, time is either spent working and requiring full compensation, or not working and requiring no compensation. \(^{174}\) Authors have suggested that Congress amend the FLSA to create a separate category for such time that does not easily fit in either category. \(^{175}\) Such a category would allow the employer to state in advance who is on call and requires compensation, avoiding litigation after the fact. While a separate category may create more paperwork initially to pay employees at two different wages, many industries have already implemented a similar categorical system. \(^{176}\)

**D. De Minimis Time**

Overtime compensation claims must have some restraint to protect employers from the hassle and administrative difficulty of recording every minimal amount of overtime an employee works. \(^{177}\) According to a federal regulation, an employer is not required to pay an employee for insignificant amounts of time that cannot practically be recorded. \(^{178}\) When the time involved is “only a few seconds or minutes of work beyond the scheduled working hours,” such time may be disregarded as the time did not require the employee to give up a substantial measure of time or effort. \(^{179}\) However, such de minimis time may aggregate to a substantial claim. \(^{180}\) In determining whether time is de minimis, courts balance the administrative difficulties of recording such minimal amounts of time, the aggregate amount of such time, and the regularity of the work. \(^{181}\) There is no firm rule determining how much time is de minimis, but rather a balancing test. \(^{182}\) This creates ambiguity for employers.

When an employee checks e-mails on a smartphone outside of work, there would be an administrative difficulty to recording the time, and the time would likely be minimal even in the aggregate. \(^{183}\) Often, it may take less than a minute or two for the employee to login to the e-mail account, note there are no new e-mails, and log out. \(^{184}\) Recording such small amounts of time could constitute a substantial administrative burden. \(^{185}\) However,

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173. Morris, supra note 166. See also Hirshberg, supra note 3 (stating the whole world has constant access to anyone with a smartphone).

174. Schwartz, supra note 76, at 221.

175. See id. at 236–37 (proposing to amend the FLSA and enact a minimum wage which is below the regular minimum wage for time spent on call).

176. See, e.g., California Overtime Pay, On-Call Wages, THE RUBEN LAW CORP., http://www.stevenrubinlaw.com/PracticeAreas/Wage-Hours-Claims.asp#Wages (last visited Feb. 5, 2010) (noting that some employers in California pay a premium, either hourly or flat rate, to employees willing to be on call). I am suggesting a lower wage, but the paperwork would be the same.

177. Rutti v. Lojack Corp., 596 F.3d 1046, 1057 (9th Cir. 2010).


179. Rutti, 596 F.3d 1046, 1056 (quoting Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 692 (1946)).

180. Id. at 1057.

181. Id. (quoting Lindow v. United States, 738 F.2d 1057, 1062 (9th Cir. 1984)).

182. Id.

183. Schlossberg & Malerba, supra note 5.

184. Id.

185. Id.
if an employee regularly checks and responds to e-mails over an entire weekend, that could be aggregated to more than a de minimis amount of time and require compensation.\textsuperscript{186} This is another instance where a balancing test provides little guidance for employers.

IV. RECOMMENDATION

Just as Congress was worried about the strain and pressure on employees in the early 19th century, Congress should now be worried about the economic strain on employers and the economy when requiring the employer to pay for overtime that he did not want or authorize the employee to perform.\textsuperscript{187} Both the economy and the labor force have changed significantly since Congress enacted the FLSA in 1938, yet it has not updated the FLSA to adapt to these changes.\textsuperscript{188} Employers have sought to modernize the FLSA numerous times, pleading to Congress that the current laws are out-of-date and need to be adjusted to reflect changes in society and the workplace.\textsuperscript{189} Technological advances like smartphones raise new overtime and compensation issues for employers, and many attorneys worry that employees may bring suit demanding pay for such time.\textsuperscript{190} Employers with decreasing revenue need to cut costs in order to survive, and often the first cost to cut is labor, typically through a reduction in the workforce.\textsuperscript{191} If an employer could create a policy against overtime, employers could likely reduce those unnecessary costs and maintain the same number of employees at the same wages. However, employers cannot create such a policy and be confident it will protect them until Congress clarifies the FLSA and gives weight to such policies.

A. Congress Should Amend and Clarify the FLSA

Under the FLSA, vague definitions of “work,” “knowledge,” and “on-call time” make it difficult for an employer to create a policy because employers do not know how a court will interpret these terms.\textsuperscript{192} The prevailing definition of work includes an activity the employer controlled or required and that was performed for the primary benefit of the employer, but courts have not applied this standard consistently. Congress should clarify the court’s interpretation of this standard and limit the definition of work to activities that were either explicitly or implicitly required or requested by the employer and eliminate the control element. In addition, Congress should follow \textit{Holzapfel} and look at how much time the employer reasonably required.\textsuperscript{193} If a reasonable person would not feel any time

\textsuperscript{186} \textit{Id.}
\textsuperscript{187} See supra Part II.A (discussing the purpose and enactment of the FLSA); Weiner & Morris, \textit{supra} note 139 (suggesting employers look to cut overtime costs in tough economic times).
\textsuperscript{189} See, e.g., \textit{William G. Whittaker, THE FAIR LABOR STANDARDS ACT 32} (2003) (noting there have been proposals to amend the FLSA in most sessions since the 1938 enactment).
\textsuperscript{190} Jones, \textit{supra} note 92.
\textsuperscript{191} Weiner & Morris, \textit{supra} note 139.
\textsuperscript{192} See supra Parts II.E (defining work), III.A (discussing voluntary work), III.B.1 (discussing employer knowledge), III.C (discussing on-call time).
\textsuperscript{193} See supra Part III.B.3 (discussing \textit{Holzapfel} and other court interpretations of how much time was required for a certain activity).
was required—such as when the employer did not request the overtime—the employee would not be entitled to compensation.

When an employee performs work away from the job site, federal regulations state the employer must have knowledge of such work in order for the time to require compensation, but courts have interpreted that to include when the employer “should have known,” even when that knowledge seemed unreasonable. Knowledge may be obvious to an employer if a supervisor or other member of management receives an e-mail from an employee when the employee is not working. However, if the e-mails are to other non-management employees, it seems possible the employer could be unaware. Congress should clarify the knowledge requirement so that if an employer is in fact unaware and has no reason to know such work is being performed, the employee does not earn compensation. To prevent an employer from pleading ignorance, courts can impute knowledge if the employer reasonably should have known that employees were performing work.

As a general suggestion, Congress could allow employers to correct any unintentional violations of the FLSA prior to imposing fines or prosecution. In addition, Congress should allow an employer to create a company policy against voluntary overtime that would serve as prima facie evidence the employer did not have knowledge. The employee or Secretary of Labor bringing the action would have the burden to show knowledge. If the employer had a policy against overtime and strictly enforced it, requiring the challenger to show knowledge would eliminate baseless claims by disgruntled employees attempting to recover based on the uncertainty of the law. The FLSA should support an employer in trusting its employees to follow company policy and not impute knowledge when the employer had no reasonable way of knowing about the overtime.

Congress should also enact an on-call wage, which could apply to employees who do need to be available to the employer outside of normal work hours. The FLSA currently has only two categories, work and leisure, although often an activity does not fit clearly into either category. With an on-call wage, if the employee is on call and entitled to compensation, the employer would pay a set rate that is lower than the required minimum wage. In that situation, the employer would tell an employee that he is on call, that the employer expects him to check his e-mails at certain times, and that he will receive compensation at the on-call wage for such time.

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194. See supra Part III.B.1 (discussing employer knowledge).
195. Wilson, supra note 188.
196. Schwartz, supra note 76, at 237.
197. Id. at 221. For example, consider a repair technician for a utility company who is on call for a weekend. He is not working and can use the time for personal activities, but must remain available and ready to be at work within 20 minutes. The 20 minute restriction means he cannot travel even a short distance nor can he attend events like a movie in which he would not have easy access to his phone. He would be waiting to be engaged and would receive the on-call wage for that time.
198. Id. at 237.
B. The DOL Should Update Its Regulations

Considering that Congress has substantively changed the FLSA only a few times since it was enacted in 1938, an amendment seems unlikely. Alternatively, the DOL could update the Code of Federal Regulations to reflect changes in technology, following the suggestions for Congress stated in Part IV.A. The Code of Federal Regulations is not binding on the courts, but it provides a practical guide for employers in how the courts may interpret the FLSA. Scholars have previously seen the need for the DOL to update regulations and simplify compliance, particularly for small businesses. Practically speaking, it is also unlikely the DOL will be able to address this overtime issue in any regulations based on prior struggles to find bipartisan support for even minimal changes. Though the workforce has changed, it seems political lines have not, making a change in overtime regulations unlikely.

C. Employers Should Be Proactive

Whether or not Congress ultimately amends the FLSA or the DOL updates the Code of Federal Regulations, employers should act to protect themselves immediately from smartphone use by non-exempt employees. One suggestion for minimizing—but likely not eliminating—liability is to avoid giving smartphones to non-exempt employees.

Though this has been suggested as eliminating the potential for litigation, it will not solve the problem for employees who get smartphones personally as opposed to from the company. Another suggestion is to use a particular subject line like “READ NOW” or certain codes to signal when an e-mail is urgent and the employee should read it outside of work hours. However, this suggestion implies that the employer is expecting employees to check e-mails outside of work, which would inhibit an employer later trying to argue he did not require or want such work to be performed. Alternatively, employers have the option of prohibiting all remote access to e-mail. Preventing access seems impractical for the exempt employees who often work away from the office and also for situations in which an employer would allow remote access, such as when an employee was sick and wanted to work from home for a day.

199. See supra Parts II.B (discussing the Portal-to-Portal Act that amended compensable time), II.C (discussing the addition of enterprise coverage). Other amendments have increased the minimum wage and extended coverage to certain workers, including those in the construction industry and farming. SMITH ET AL., supra note 12, § 5.1.2.1.


201. Wilson, supra note 188.

202. See Rothe, supra note 3, at 734 (discussing the obstacles of the 2004 revisions to the white-collar exemption).

203. Id.


Primarily, employers should create a clear policy prohibiting employees from working overtime without first obtaining permission. For example, a company policy could require an employee to obtain specific permission before checking any e-mails away from the office and to log any time spent doing so. Under that policy, an employer is unaware of overtime if the employee did not request permission or record any time. Even so, it is not enough to just have the policy; the employer must strictly enforce the policy through disciplinary action.

Employers should also consider whether it would be cost effective to implement a time-keeping system to track the time employees are remotely logged into the e-mail system. For large companies, tracking this time could be an expense that will pay off in the future by decreasing the overtime claims. However, the expense is likely unbearable for small employers. Further, employers have no clear standard as to what amount of time—say, ten minutes—is de minimis and does not require compensation. Unless the employer knows at what point the employee’s time is no longer de minimis, the time system does not clarify when the employee must be paid. Nevertheless, such a system would allow employers to track employee time outside of work and allow the employer to discipline employees for violating the no overtime policy.

Until Congress clarifies the FLSA or the DOL enacts new regulations to guide courts, courts and employers will continue to dispute the definitions of work and knowledge and what qualifies under each category. In the meantime, employers should create clear policies to minimize their liability for overtime claims and precisely explain such policies to all employees. Management then must strictly enforce such policies.

V. CONCLUSION

Employers are in a tough position. As they try to cut costs in a struggling economy, many find themselves defending unpaid overtime claims for overtime that the employee voluntarily worked without permission or direction from the employer. Vague definitions in the FLSA itself and broad interpretations from courts make it hard for an employer to predict how a court will interpret a situation dealing with new technology like smartphones. In addition, a policy by the employer against overtime does nothing more than provide a means for workplace discipline; it does not allow the employer to avoid compensation when an employee works overtime even if such work is a violation of the company policy.

In the more than 70 years since Congress enacted the FLSA, the line between work and leisure has blurred, and both employers and courts are struggling to adapt the original FLSA standards to changing conditions. Congress needs to clarify the FLSA by stating

208. Matus, supra note 206.
209. Id.
210. Schlossberg & Malerba, supra note 5. See also supra Part III.B.1–2 (discussing Dep’t of Conservation and Debose, in which the courts expressly noted whether or not the employer had ever disciplined an employee for violating the policy).
211. Panken & Babson-Smith, supra note 207.
212. For example, a large employer of 500 employees likely already has an information technology department capable of running the system and sufficient capital to finance the purchase. A small company with only 50 employees may not have the internal support nor the economic resources to invest in such a system.
213. See supra Part III.D (discussing de minimis time).
concrete definitions for the terms “work,” “knowledge,” and “on call.” In addition, the DOL should enact standards and guidelines to assist employers in creating and enforcing policies which prohibit their employees from checking e-mails outside of working hours, a task which can so easily be done by an employee with a smartphone. Until Congress or the DOL takes action, employers need to draw a clear line for employees between work which is required by the employer and is therefore compensable and personal activities that are not required and do not deserve compensation. Weisure needs to be divided back into work and leisure as two distinct concepts, not only for the sake of the employee, but also for the employer.