Labor and Employment Alert: When It Comes to Off-the-Clock Work, Employer Knowledge is Key

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FLSA claims involving off-the-clock work have become a popular claim in recent years. A recent Eleventh Circuit ruling has made employer defenses to such lawsuits a bit more challenging. In *Bailey v. TitleMax of Ga., Inc.* (11th Cir., No. 14-11747, 1/15/15), the employer argued that the plaintiff's claims should be barred because the plaintiff failed to report all hours worked, which caused the company to under-compensate the plaintiff. The Eleventh Circuit rejected this argument, finding that the company knew or should have known that an employee was underreporting his hours. While the company had a policy for ensuring accurate time records and a complaint procedure that the plaintiff failed to utilize, it could not skirt the claims since it had reason to know the plaintiff was working off-the-clock. Bailey's direct supervisor both instructed him to work off-the-clock and repeatedly edited his time records to reduce the number of hours reported. The court noted that "knowledge may be imputed to the employer when its supervisors or management encourage artificially low reporting."

By comparison, the Sixth Circuit has previously ruled in favor of employers where an established complaint policy was not utilized. In *White v. Baptist Memorial Health Care Corp., et al.*, 699 F.3d 869 (6th Cir. 2012), the Sixth Circuit held that "if an employer establishes a reasonable process for an employee to report uncompensated work time[,] the employer is not liable for non-payment if the employee fails to follow the established process." The plaintiff, Margaret White, worked as a nurse for the defendant hospital. Given the nature of her work, meal breaks occurred as work demands allowed. White received an employee handbook, which indicated that meal breaks were required for shifts of certain lengths, and provided instructions on how to report missed breaks in an "exception log." In the beginning of her employment, White reported missed breaks in the exception log and was compensated accordingly. At some point, she stopped reporting missed breaks, and was not compensated as a result. White was also aware of, but failed to utilize, the hospital's complaint procedure whereby she could report payroll errors.

In ruling for the employer, the court noted that "[a]n employer cannot satisfy an obligation that it has no reason to think exists. And an employee cannot undermine his employer's efforts to comply with the FLSA by consciously omitting [] hours for which he knew he could be paid." The court reasoned that because the employee failed to report the hours, the employer did not know those hours needed to be compensated. Importantly, the court noted that there was no evidence that the hospital discouraged employees from reporting time worked during breaks.

Despite the differing outcomes, these cases can be viewed as a guideline for employers. The *Bailey* case essentially places a restriction on the holding in *White* – the existence of a complaint process is not sufficient to avoid liability for off-the-clock work when the employer had reason to know such work was being performed. Thus, employers will not be held liable for off-the-clock work by employees where the employer has an established complaint policy and the employee fails to complain, so long as the employer does not know or have reason to know about the work. If the employer knows or has reason to know about the work, the risk of liability remains.

Contact your Vorys lawyer to discuss how your business practices and policies can protect against off-the-clock work claims.