The Fair Labor Standards Act, Overtime Compensation, and Personal Data Assistants

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Summary

The increased use of personal data assistants (PDAs) and smartphones by employees outside of a traditional work schedule has raised questions about whether such use may be compensable under the Fair Labor Standards Act (FLSA). As PDAs and smartphones provide employees with mobile access to work email, clients, and co-workers, as well as the ability to create and edit documents outside of the workplace, it may be possible to argue that employees who are not exempt from the FLSA's requirements and who perform work-related activities with these devices should receive overtime if such activities occur beyond the 40-hour workweek.

This report reviews the FLSA's overtime provisions, and examines some of the U.S. Supreme Court's seminal decisions on work. Although PDAs and smartphones provide a new opportunity to consider what constitutes work for purposes of the FLSA, the Court's past FLSA decisions, including those involving on-call time, may provide guidance on how courts could evaluate overtime claims involving the new devices.

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The Fair Labor Standards Act (FLSA) requires the payment of a minimum wage, as well as overtime compensation at a rate of not less than one and one-half times an employee's hourly rate for hours worked in excess of a 40-hour workweek.[1] While the FLSA exempts some employees from these requirements based on their job duties or because they work in specified industries, most employees must be paid in accordance with the statute's requirements for work performed.[2] The increased use of personal data assistants (PDAs) and smartphones by employees outside of a traditional work schedule has raised questions about whether such use may be compensable under the FLSA. As PDAs and smartphones provide employees with mobile access to work email, clients, and co-workers, as well as the ability to create and edit documents outside of the workplace, it may be possible to argue that non-exempt employees who perform work-related activities with these devices should receive overtime if such activities occur beyond the 40-hour workweek.

This report reviews the FLSA's overtime provisions and examines some of the U.S. Supreme Court's seminal decisions on work. Although PDAs and smartphones provide a new opportunity to consider what constitutes work for purposes of the FLSA, the Court's past FLSA decisions, including those involving on-call time, may provide guidance on how courts could evaluate overtime claims involving the new devices.

"Work" and the Fair Labor Standards Act

Section 7(a)(1) of the FLSA, states, in relevant part,

> [N]o employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce, or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.[3]

The term "employ" is defined by the FLSA to mean "to suffer or permit to work."[4] The term "work," however, is not defined by the statute. In 1944, the Supreme Court sought to clarify the meaning of that term in *Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123*, a case involving miners who travelled daily to and from the working face of underground iron ore mines.[5] Muscoda Local No. 123 and two other unions representing the miners maintained that the workers' hours of employment should include the travel time, and that the miners were entitled to overtime compensation because their hours of employment exceeded the statutory maximum workweek.

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[1] 29 U.S.C. §§201-219.

[2] *See, e.g.*, 29 U.S.C. §213(a)(1) (exempting from the FLSA's minimum wage and overtime requirements "any employee engaged in a bona fide executive, administrative, or professional capacity ... "). The U.S. Department of Labor maintains that an estimated 130 million workers were subject to the Fair Labor Standards Act in 2009. See U.S. Dept. of Labor, Employment Law Guide: Wages and Hours Worked, Minimum Wage and Overtime Pay (Sept. 2009), *available at* http://www.dol.gov/compliance/guide/minwage.htm.

[3] 29 U.S.C. §207(a)(1).

[4] 29 U.S.C. §203(g).

[5] 321 U.S. 590 (1944). The "working face" is "the place in the mine where the miners actually drill and load ore." See *id*. at 592 n. 2.

Without a statutory definition for "work," the Court in *Tennessee Coal* relied on the plain meaning of the term to conclude that the miners' travel time should be construed as work or employment for purposes of the FLSA. The Court noted, "[W]e cannot assume that Congress here was referring to work or employment other than as those words are commonly used—as meaning physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business."[6] The Court maintained that the dangerous conditions in the mine shafts provided proof that the journey to and from the working face involved continuous physical and mental exertion. In addition, the miners' travel to and from the working face was not undertaken for the convenience of the miners, but was performed for the benefit of the mining companies and their iron ore mining operations.

In *Armour v. Wantock*, the Court clarified that actual physical or mental exertion was not necessary for an activity to constitute work under the FLSA.[7] In *Armour*, a group of fire guards who remained on call on the employer's premises contended that they were entitled to overtime compensation for their on-call time. Although the employer attempted to make this time tolerable by providing beds, radios, and cooking equipment, the Court found that the guards were entitled to overtime compensation. The Court observed the following:

> Of course an employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for something to happen. Refraining from other activity often is a factor of instant readiness to serve, and idleness plays a part in all employments in a stand-by capacity. Readiness to serve may be hired, quite as much as service itself, and time spent lying in wait for threats to the safety of the employer's property may be treated by the parties as a benefit to the employer. Whether time is spent predominantly for the employer's benefit or for the employee's is a question dependent upon all the circumstances of the case.[8]

In *Anderson v. Mt. Clemens Pottery*, a 1946 case involving workers at a pottery plant and the computation of compensable work time, the Court concluded that time spent walking to a work area on the employer's premises after punching a time clock was compensable.[9] The Court indicated that because the statutory workweek includes all time that an employee is required to be "on the employer's premises, on duty, or at a prescribed workplace," the time spent in these activities must be compensated.[10] Other preliminary activities, such as putting on aprons and preparing equipment, were also found to be compensable because they were performed on the employer's premises, required physical exertion, and were pursued for the employer's benefit.

At the same time, however, the Court in *Mt. Clemens Pottery* recognized "a de minimis rule" for activities that involve only a few seconds or minutes of work beyond an employee's scheduled work hours. The Court explained that "[i]t is only when an employee is required to give up a substantial measure of his time and effort that compensable working time is involved."[11]

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[6] *Id*. at 598.

[7] 323 U.S. 126 (1944).

[8] *Id*. at 133.

[9] 328 U.S. 680 (1946).

[10] *Id*. at 691.

[11] *Id*. at 692.

Fearing that *Mt. Clemens Pottery* would subject employers to significant and "wholly unexpected" financial liabilities, Congress passed the Portal-to-Portal Act, which abolished all claims for unpaid minimum wages and overtime compensation related to activities engaged in prior to May 14, 1947.[12] The Portal-to-Portal Act also provided prospectively that an employer would not be subject to liability under the FLSA for failing to pay a minimum wage or overtime compensation for travel to and from the place where an employee's principal activity or activities are performed, or for activities that are "preliminary to or postliminary to [those] principal activity or activities."[13]

The Court's recognition of a de minimis rule and the enactment of the Portal-to-Portal Act have been viewed as attempts to limit the broad definition of "work" established in *Tennessee Coal*.[14] Even after the Portal-to-Portal Act's enactment, however, the Court continued to find certain preparatory and concluding activities to be compensable under the FLSA. In *Steiner v. Mitchell*, for example, the Court found that the time spent by workers in a battery plant changing clothes at the beginning of a shift and showering at the end of a shift was compensable work time under the FLSA.[15] Citing a colloquy between several senators and one of the sponsors of the Portal-to-Portal Act, the Court maintained that Congress did not intend to deprive employees of the benefits of the FLSA if preliminary or postliminary activities are an integral and indispensible part of the principal activities for which they are employed.[16] In *IBP v. Alvarez*, the Court further concluded that the time spent walking between a changing area where protective clothing was put on and taken off and a work area was also compensable time under the FLSA.[17]

Personal Data Assistants and Smartphones

Whether non-exempt workers may be entitled to overtime compensation for work activities performed using a PDA or smartphone beyond a 40-hour workweek will probably depend on the facts of each case. At a minimum, an employee seeking such compensation will likely have to establish that he was engaged in compensable work. The factors articulated by the Court in *Tennessee Coal* continue to be recognized as a starting point for determining whether an employee's activities constitute work under the FLSA.[18] First, does use of a PDA or smartphone require physical or mental exertion? Second, is the use of a PDA or smarthphone controlled or required by the employer? Finally, is the use of a PDA or smartphone necessarily and primarily for the benefit of the employer and his business?

While the facts of each case will ultimately determine whether the *Tennessee Coal* factors are satisfied, it seems possible that at least some PDA or smartphone use could be viewed as

[12] 29 U.S.C. §§251-262. See H.Rept. 80-71, at 5 (1947), *reprinted in* 1947 U.S.C.C.A.N. 1029, 1034 ("The evidence is conclusive that the maintenance of these suits or the attempts to prosecute them further is a serious threat to the welfare of the Nation. The cost would bankrupt many employers and seriously retard the activities of many others. The amount claimed in some suits is more than the value of the employer's plant.").

[13] 29 U.S.C. §254(a).

[14] See Sean L. McLaughlin, Comment, Controlling Smart-Phone Abuse: The Fair Labor Standards Act's Definition of "Work" in Non-Exempt Employee Claims for Overtime, 58 U. Kan. L. Rev. 737, 757 (2010).

[15] 350 U.S. 247 (1956).

[16] *Id*. at 254-56.

[17] 546 U.S. 21 (2005).

[18] *See, e.g.*, Alvarez, 546 U.S. at 25 (discussing *Tennessee Coal*). See also McLaughlin, *supra* note 14 at 749.

compensable work under the FLSA. Even with the Court's reconsideration in *Armour* of the need for physical or mental exertion to constitute work, it appears reasonable to conclude that at least some PDA or smartphone use will require mental exertion. An employee responding to work email or reviewing or editing documents is arguably engaged in mental exertion. Further, providing PDAs and smartphones to non-exempt employees without any statement or policy about not using the devices outside of regular work hours may lead to the conclusion that their use is controlled or required by the employer, particularly if supervisors or senior employees send messages or documents with the expectation that they will be immediately read or reviewed.[19] Finally, because employers could benefit from an employee's response to email or his review of a document after regular work hours, it could be argued that the employee's PDA or smartphone use is necessarily or primarily for the benefit of the employer and his business.

The absence, however, of any significant case law involving the FLSA and PDA or smartphone use makes it difficult to know exactly how courts will evaluate related claims for overtime compensation. Some believe that cases involving on-call time could be instructive, particularly because they present an analogous situation in which an employee is kept in constant contact with the employer. [20] In *Skidmore v. Swift & Co*., one of the Court's early cases involving on-call time and the payment of overtime compensation, the Court indicated that the law does not preclude "waiting time from also being working time."[21] The Court maintained, however, that the availability of overtime pay involves an examination of the agreement between the parties, consideration of the nature of the service provided and its relation to the waiting time, and all of the surrounding circumstances.[22]

In reversing a denial of overtime compensation in *Skidmore*, the Court further explained that whether on-call time should be considered compensable under the FLSA

> depends upon the degree to which the employee is free to engage in personal activities during periods of idleness when he is subject to call and the number of consecutive hours that the employee is subject to call without being required to perform active work. Hours worked are not limited to the time spent in active labor, but include time given by the employee to the employer.[23]

Since the Court's decision in *Skidmore*, other courts have found on-call time compensable under the FLSA. In *Pabst v. Oklahoma Gas & Electric Co*., for example, the U.S. Court of Appeals for the Tenth Circuit determined that a group of electronic technicians who were expected to respond to alarms sent to their pagers and computers were entitled to compensation for their on-call time.[24] Citing *Skidmore* and *Armour*, the court focused on the burdens placed on the technicians

[19] *See* McLaughlin, *supra* note 14 at 751 ("The 'required' element could also be imputed if senior employees consistently send e-mails and documents after hours with the expectation that non-exempt workers will check their smart phones during the evening or weekend.").

[20] *See* Jana M. Luttenegger, *Smartphones: Increasing Productivity, Creating Overtime Liability*, 36 J. Corp. L. 259, 274 (2010) ("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. [footnote omitted] 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."). See also McLaughlin, *supra* note 14.

[21] 323 U.S. 134, 136 (1944).

[22] *Id*. at 137.

[23] *Id*. at 138

[24] 228 F.3d 1128 (10th Cir. 2000).

as a result of their on-call duties, such as diminished sleep habits because of the frequency of the alarms and the employer's required response time.

Where the burdens placed on employees as a result of on-call duties are minimal, courts appear more likely to find that on-call time is not compensable under the FLSA.[25] In *Owens v. Local No. 169*, for example, the Ninth Circuit concluded that an employer with an ongoing policy of phoning its regular daytime mechanics after hours to return to the workplace to fix equipment was not liable for overtime compensation resulting from the employees' on-call duties.[26] The court maintained that the employer's on-call policy was far less burdensome than other policies that had been successfully challenged. Unlike the technicians in *Pabst*, the mechanics in *Owens* were not required to respond to all calls and received an average of only six calls a year.[27]

The courts' focus on an employee's ability to engage in personal activities in on-call cases may indeed prove instructive as they begin to consider whether work-related PDA and smartphone use is compensable under the FLSA. Although a court may find that an employee's use of a PDA or smartphone is "work" for purposes of the FLSA, it may conclude that such use is so minimal or unobtrusive that it is not compensable under the FLSA. Such a finding would seem to be consistent not only with the on-call jurisprudence, but also with the de minimis rule articulated by the Court in *Mt. Clemens Pottery*. At the very least, a court will likely have to evaluate all of the circumstances of an employee's case to determine whether his PDA or smartphone use is compensable.

Outlook

As PDA and smartphone use by employees increases and the expectations of supervisors, co-workers, and clients evolve, it seems likely that courts will be confronted with numerous cases involving overtime compensation based on the work-related use of these devices. At least one case involving the retail sales consultants and assistant store managers of AT&T Mobility is currently being litigated. The non-exempt plaintiffs in *Zivali v. AT&T Mobility* are seeking overtime compensation for their work outside of their regular work hours.[28] The employees argue that AT&T Mobility required them to carry company-owned smartphones and encouraged them to provide their numbers to customers. They contend that AT&T Mobility fosters a corporate culture in which employees "are expected to perform certain tasks off-duty."[29] In May 2011, a federal district court found that the plaintiffs were not similarly situated for purposes of maintaining a collective action under the FLSA.[30] However, the court also concluded that the evidence suggested that at least some of the plaintiffs might be able to recover uncompensated overtime from AT&T Mobility, and rejected the company's motion for summary judgment. The case is likely to be watched closely by both employers and employees who are required to carry PDAs and smartphones.

[25] *See* The Fair Labor Standards Act 8-31 (Ellen C. Kearns ed., 2010).

[26] 971 F.2d 347 (9th Cir. 1992).

[27] *Id*. at 353.

[28] 2011 WL 1815391 (S.D.N.Y. 2011).

[29] *Id*. at *5.

[30] See *id*.

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