

## Ask the Lawyer: What About "Off-the-Clock" Compensation?

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Question:

I have an hourly employee who is struggling to keep up with his work load. Do I have to pay him for any work he voluntarily does off-the-clock either at the office or at home?

Response:

When you are an employer, it is important to remember that just because an hourly employee is working voluntarily does not mean he or she is working for free.

Generally, the fact that a manager did not tell an hourly employee to work late does not relieve the employer of liability in terms of overtime pay. The Fair Labor Standards Act states, "Work not requested but suffered or permitted is work time." The law adds that so long as the employer "knows or has reason to believe that the work is being performed," that time must count as working hours.

It is the responsibility of management to rein in hourly employees' attempts to work outside regular working hours without authorization. And just having a rule against working over so many hours a day or a week is not enough.

With technology, such as the iPhone and Blackberry, blurring the lines between working hours and non-working hours, it is not uncommon for employees to claim their work day started before they arrive to the office.

For example, *Greg Kuebel, et al. v. Black & Decker Inc.*, 643 F.3d 352 (2d Cir. 2011), involved a retail specialist for a home improvement retail chain.

The employee claimed it was impossible to perform all of his duties within a 40-hour workweek and he downplayed the number of hours he actually worked on timesheets because management allegedly stressed retail specialists should not put down more than 40 hours per week.

The employee sued the retailer for violating the FLSA and New York's Labor Law.

Due to his time constraints, the retail specialist performed various administrative tasks at home, such as checking his email and voicemail and printing sales reports, before leaving home and after leaving his store. He claimed the retailer should also compensate him for his time spent commuting between those locations.

The U.S. Court of Appeals for the Second Circuit rejected the claim for commuting time, noting that the FLSA generally does not regard "home-to-job-site" as compensable. "The fact that (an employee) performs some administrative tasks at home, on his own schedule, does not make his commute time compensable any more than it makes his sleep time or his dinner

time compensable,” the court said.

The court also stated, however, the employee raised genuine issues of fact indicating his employer may have known he was working off-the-clock. And while a lower court dismissed the employee’s off-the-clock claims because he was the one who falsified his time sheets so they showed no overtime hours, the appellate court disagreed with this conclusion. It noted that the ultimate responsibility for ensuring timesheet accuracy was on the employer. Otherwise, employers would be able to circumvent the FLSA by having its managers “unofficially pressure (employees) not to record overtime, and then, when an employee sues for unpaid overtime, assert that his claim fails because his timesheets do not show any overtime.”

The FLSA is a very complex law, and employers with questions on how to properly compensate hourly employees, or have questions on potential “off-the-clock” claims, should consult with an employment law attorney.