

NOVA Legal Beat: Overtime for Off-the-Clock Work?

Q. I'm swamped at the office and often work 12-hour days. My employer says I'm not allowed to work overtime, so I end up working off the clock. Can I collect overtime for this off the clock work?

A.

Employers cannot prohibit overtime and knowingly benefit from it without compensating employees for such work. The figure of speech, "You cannot have your cake and eat it, too," certainly applies to such situations. The Fair Labor Standards Act (FLSA) requires employers to pay employees not exempt from the law overtime at a rate of at least time-and-a-half for hours worked over 40 hours during a work week. Exempt employees include certain executive, administrative, professional and outside sales employees, among others. The fact that an employee was not ordered to stay after hours and voluntarily worked off the clock to complete certain tasks does not automatically disqualify him or her for overtime. "Work not requested but suffered or permitted is work time... The reason is immaterial. The employer knows or has reason to believe that he is continuing to work and the time is working time," federal regulation states. As this regulation suggests, employer knowledge is important to FLSA overtime claims. Knowledge that an employee is working off the clock makes the employer obligated to provide compensation for such work, the U.S. District Court for the Eastern District of Virginia noted in *Truslow v. Spotsylvania County Sheriff*

(1992). Employers' refusal to authorize overtime does not necessarily make them immune to FLSA overtime claims. Employers should not close their eyes to the off-the-clock work performed by employees and expect these refusals to save them in court. As the Eastern District Court noted in *Truslow*

, employers must act to stop any unwanted overtime work they know, or should know, is being performed. An employer cannot "stand idly by and allow an employee to perform overtime work without proper compensation, even if the employee does not make a claim for the overtime compensation." This knowledge requirement could be satisfied if the employer observed the employee working overtime or was told he or she was working overtime. Additionally, an employer could have constructive knowledge of overtime work performed in situations where a "plaintiff's job required the task that took up the overtime hours and plaintiff had not been prohibited from working the extra time," the Eastern District Court said in *Gonzales v. McNeil Technologies, Inc.*

(2007). Employees who believe they are not being compensated for overtime hours worked off-the-clock should consult with an experienced employment law attorney who can prepare an FLSA lawsuit. An attorney can help the employee calculate how much overtime compensation he or she should receive and show that the employee knew or should have known such overtime work was being performed. Mathew B. Tully is the founding partner of Tully Rinckey PLLC. Located in Arlington, Va. and Washington, D.C., Tully Rinckey PLLC's attorneys practice federal employment law, military law, and security clearance

representation. To speak with an attorney, call 703-525-4700 or to learn more visit fedattorney.com

.