

“COMPENSABLE TIME” A TRAP FOR THE UNWARY EMPLOYER

In days past, when employees routinely worked shifts that were clearly bounded by the time the employees punched their timecard in the morning and out in the evening, employers could afford giving little thought to the concept or definition of “compensable time.” With the varied and ever-changing ways in which modern corporations conduct business, however, questions surrounding “compensable time” can present a significant trap for the unwary.

Consider just three examples: (1) an “on-call” employee who conducts business by telephone during evenings or weekends; (2) a customer service employee who spends time traveling to customer locations and remotely reports back to the office; and (3) an employee of a temporary services agency who spends time interviewing with the agency’s clients. Which of these activities, if any, constitute “compensable time” for which the employer must pay the employee? The answers are discussed below.

Why should companies care about this question? There is often a temptation, well-grounded in common sense and the many other demands on companies’ time, simply to ignore the issue. After all, most employees are unlikely to complain (much less sue) over a few extra minutes, right? Indeed, the issue is unlikely ever to arise... until a company conducts layoffs or terminates a poor performer, in which case, even if those termination decisions are well-justified, they can open the door for a disgruntled employee to raise the issue of compensable time.

And the extent of potential liability for seemingly minor disputes over compensable time may surprise you. A few minutes every day over a four-year period (the likely statute of limitations under California law) can add up. A terminated employee can also seek 30 days of additional pay as a penalty. Multiply all of that, in a class action context, by all similarly situated employees. Throw in attorneys’ fees for the plaintiff’s counsel, and a few minutes of compensable time can quickly snowball into a potentially multi-million dollar liability.

These issues affect companies in nearly any industry. Today, it is commonplace for employers to issue Blackberries, cell phones, pagers, or other devices to employees so that they can “stay connected” and conduct business away from the office. If they conduct that business outside of work hours, however, there is a potential for trouble.

A recent judicial decision offers an extreme example.¹ In that case, the plaintiffs were required by the employer to remain “on call” at certain times and also to carry pagers.

The court in that case held that the time the plaintiffs spent on call but not actively responding to pages (the “on-call waiting time”) was not compensable, because it did not unduly restrict the plaintiffs’ ability to engage in personal activities.

The court also concluded, however, that the plaintiffs were entitled to additional compensation for any time they spent responding to pages. The defendant had argued that even if that time was compensable, it was *de minimis*. The plaintiffs, however, presented evidence that they spent between six and nine hours each week responding to pages. Of course, no one but the plaintiffs themselves was able to present much evidence on that question, and they had every incentive to inflate that number. Nevertheless, their testimony was sufficient to create a triable issue of fact.

Additional dangers lurk for companies who require employees to be “on call” outside of work hours. In the case discussed above, the plaintiffs lost on their claim for “on-call waiting time” because they were only required to respond within 30 minutes, which was deemed not to interfere too much with their off-duty activities. The decision suggests, however, that if employees are required to respond immediately to pages, the on-call waiting time itself may also be compensable.

A second recent decision addresses the issue of compensable time with respect to employees who regularly work outside of their employers’ places



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of business.² In that case, the plaintiff conducted most of his work at the clients’ locations. He was compensated on an hourly basis, beginning when he arrived at his first job location and ending when he completed his final job installation of the day. He sought compensation for commuting time, as well as time spent organizing his route and transmitting reports.

The court held that the plaintiff was not entitled to compensation for the time he spent commuting. The court observed that commuting time generally is not compensable, and the court found no reason to apply a different rule when the commute was to a client’s – rather than the employer’s – place of business. The court further held that the plaintiff was not entitled to compensation for the time he spent planning his route, since that time was related to the commute.

The court did hold, however, that the plaintiff could recover additional compensation for the time the plaintiff spent transmitting reports to his employer at the end of the day. The court observed that those transmissions appeared part of his regular work in the ordinary course of business and were, therefore, compensable.

A third recent decision addresses the issue of compensable time as it specifically relates to employees of a temporary services agency.³ In that case, the question was whether such employees were entitled to compensation for the time they spent interviewing with clients of the agency for temporary positions with those clients. This question was a tricky one. On the one hand, generally, time that job applicants spend interviewing for positions is not compensable. On the other hand, the plaintiffs argued that the interviews were a part of their job duties in their specific relationship with the agency, and that the agency should be required to compensate them even if the clients were not obligated to do so.

The court held that a temporary agency employee’s entitlement to compensation for interview time would turn on the degree of the agency’s control over the employee during the interviews. Specifically, in that case, the agency controlled all communications with its customers regarding potential assignments for temporary employees, outside of the interview itself; the agency decided which of its temporary employees to send on an interview; the agency sent the customers resumes with the agency’s name in place of the temporary employee’s to ensure that customers could only contact the agency regarding the placement; the agency arranged the interview and restricted temporary employees’ communication with the customers so that only the agency could arrange the time, place and date of the interview; if a temporary employee was running late to an interview, he or she was required to contact the agency to relay that information to the customer; and after interviews, the agency controlled all follow-up communication with the customer. Based on this high level of control that the agency exercised over the temporary employees while interviewing, the court concluded that the time spent interviewing was compensable.

The court further held, however, that the plaintiffs were not entitled to compensation for the time they spent traveling to and from interviews. In so ruling, the court concluded that the agency did not exercise control over the plaintiffs in the same manner with respect to that time.

In each of these three decisions, the courts found partially in favor of the plaintiff employees and partially in favor of the defendant employers. At first blush, that does not sound so bad. But a plaintiff who even partially prevails on such wage claims may be entitled to attorneys’ fees as a “prevailing party.” Thus, even in cases (as above) where the employer wins many (or even most) of its arguments, it may still be on the hook for a significant liability. Take away? Employers should be cautious in requiring – or even permitting – their employees to engage in off-the-clock work, which a court may later decide is compensable time.

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¹ *Gomez v. Lincare Corp.*, 173 Cal. App. 4th 508 (2009).

² *Rutti v. Lojack Corp., Inc.*, 596 F.3d 1046 (9th Cir. 2010).

³ *Sullivan v. Kelly Services, Inc.*, 2009 WL 3353300 (N.D. Cal. Oct. 16, 2009).

