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10 Costly FLSA Mistakes

Why Companies Are Losing in Court

A SPECIAL REPORT FOR EXECUTIVES

10 Costly FLSA Mistakes: Why Companies Are Losing in Court

PBP Executive Reports are straightforward, fast-read reports designed for time-pressed upper-level executives and managers. PBP Executive Reports excel at cutting the fluff, eliminating jargon and providing just the information today's executives need to improve their organizations' performance.

This Executive Report was researched and produced by the editors of *What's Working in Human Resources*, one of the most respected publications serving the HR profession. It contains the latest thinking and best practices to guide employers on dealing with FLSA issues.

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EXECUTIVE SUMMARY

Executive Summary

Courts are coming down hard on employers that violate the Fair Labor Standards Act (FLSA) – which is getting easier and easier to do.

In courtrooms across the U.S., judges are calling overtime cases in favor of non-exempt employees like an umpire with an oversized strike zone.

The result: Workers from truck drivers to stockbrokers are winning big payouts.

It's estimated that upwards of 86% of the U.S. workforce is non-exempt from FLSA regs, especially the overtime regs. With that in mind, aggressive plaintiff lawyers are wreaking havoc by filing suit at the mere whiff of a violation.

One such attorney recently told Bloomberg Businessweek: "I can hit a company with a hundred sexual harassment lawsuits, and it will not inflict anywhere near the damage that a single wage-and-hour suit will."

While the Fair Labor Standards Act has remained largely unchanged in recent years, the way the law is interpreted is always shifting – and too frequently that doesn't bode well for employers.

With that in mind, this report examines legal trends affecting how employers are viewing FLSA. It lays out 10 recent court decisions that have left many employers re-examining the way they set up compensation policies – and how they classify the workforce.

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The Executive Report

10 Costly FLSA Mistakes: Why Companies Are Losing in Court

The Fair Labor Standards Act has been on the books for more than 70 years – and it's still driving employers crazy.

Just look at these stats:

According to Federal Court records, the number of FLSA-related cases filed in all Federal District courts nationwide jumped 20% from 2008 to 2009.

In 2010, that number jumped another 10%.

Decade to decade, the number of FLSA-related cases shot up 400%!

What's caused this explosion? Mostly a complicated statute that's open to far too many interpretations and a workforce (and plaintiffs' lawyers) buoyed by favorable rulings coming out of the courts.

Another factor: The DOL increased its roster of Wage and Hour Division field investigators by 30% in 2009.

And they've been aggressive. In 2009, Wage and Hour-sparked litigation resulted in employers paying $2.6 million in back wages to 2,190 workers.

In 2010, Wage and Hour litigation cost employers $6.5 million and involved 5,261 workers.

Pretty clear: The stakes are high, and getting higher. Most employers know that FLSA violations can carry penalties including back pay, interest,

attorneys' fees, court costs and liquidated damages.

What they might not know: The FLSA also allows for claims against individuals like corporate officers and specific managers and supervisors.

Those fines can easily reach up to $10,000 per violation – and can carry jail time for a second offender.

Where do most companies run into trouble?

Misclassifying employees as exempt from overtime is still a classic pitfall.

But so is changing an employee's wage structure to accommodate additional work hours without actually paying time-and-a-half.

As this reports illustrates, the regulations themselves leave a lot of room for interpretation. And that leaves the final word to federal judges.

This report will also outline some recent court decisions that have employers taking a second, closer look at their compensation policies and employee classifications.

How we got here

When the Fair Labor Standards Act was signed into law by President Franklin D. Roosevelt in 1938, it established a national minimum wage standard, the 40-hour workweek and overtime rules, as well as rules that strictly limited child labor.

The FLSA has been amended numerous times. The most recent involved an increase in the minimum wage to $7.25 an hour, and a requirement that employers provide break time for nursing mothers as part of the sweeping healthcare legislation passed in March 2010.

The original law, an important piece of New Deal legislation during the Depression, had three goals: a shorter work week, higher wages, and increased hiring due to the belief that the added expense of overtime would be an impetus to add staff.

Managers, supervisors and "white-collar" workers were exempt from the overtime requirement.

Changing times

Today, white-collar workers often toil in jobs requiring repetitive, non-creative and non-managerial tasks.

The traditional view was that these jobs would be considered "administrative" for the simple fact that they take place in an office rather than a factory floor – and they'd likely be classified as exempt.

That's all changed now – and that shift in focus was one of the driving forces in a 2004 amendment to the FLSA that changed the rules on employee exemptions.

The new rules

The overriding change in the regulations set a threshold salary for those eligible for exemption – $455 per week or $23,660 annually.

Employees earning less were automatically nonexempt, no matter what their duties.

The DOL also revised the executive, administrative, and professional duties tests used to determine exempt status, and included similar tests for computer employees and outside sales people.

By way of background, and to better understand how the courts are effecting real change in the FLSA, here's a rundown of the duties tests (the $455/week pay standard applies across the board):

Executive Exemption

To qualify for the executive employee exemption, all of the following tests must be met:

- The employee's primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of

the enterprise

- The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent, and
- The employee must have the authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.

Administrative Exemption

To qualify for the administrative employee exemption, all of the following tests must be met:

- The employee's primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers, and
- The employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

Professional Exemption

To qualify for the learned professional employee exemption, all of the following tests must be met:

- The employee's primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment,
- The advanced knowledge must be in a field of science or learning, and
- The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

To qualify for the creative professional employee exemption, the following test must be met:

- The employee's primary duty must be the performance of work

requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

Computer Employee Exemption

To qualify for the computer employee exemption, the following tests must be met:

- The employee must be paid not less than $455 per week or, if compensated on an hourly basis, at a rate not less than $27.63 an hour,
- The employee must be employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field.

The employee's primary duties must consist of:

1. The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications
2. The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications
3. The design, documentation, testing, creation or modification of computer programs related to machine operating systems, or
4. A combination of the aforementioned duties, the performance of which requires the same level of skills.

Outside Sales Exemption

To qualify for the outside sales employee exemption, all of the following tests must be met:

- The employee's primary duty must be making sales or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer, and
- The employee must be customarily and regularly engaged away from the employer's place of business.

Highly Compensated Employees

Highly compensated employees performing office or non-manual work and paid total annual compensation of $100,000 or more are exempt from the FLSA if they customarily and regularly perform at least one of the duties of an exempt executive, administrative or professional employee identified in the standard tests for exemption.

The cases employers need to know about

Congress passes the laws. Federal agencies set up the specific regs that must be followed to implement the laws.

But the final arbiter is often the courts. That's where the ambiguities are clarified and the details crystallized.

Here is a look at some of the recent cases that have changed the way employers view, and react to, the Fair Labor Standards Act.

The administrative exemption

Legal experts generally regard the administrative exemption as the trickiest part of FLSA.

The regs define an administrative employee as one who performs work:

- directly related to management policies or general business operations, and
- customarily and regularly exercises discretion and independent judgment.

The first statement's pretty straightforward, but there's an awful lot of leeway in the second. What constitutes discretion and independent judgment?

This case illustrates how close a call that can really be.

Insufficient discretion?

Andrew Whalen worked for J.P. Morgan Chase for four years as an underwriter, evaluating whether individual loans should be approved based on Chase's intricate and detailed guidelines.

Lending rules specified how underwriters should determine qualifying income and credit history and how they should compare that information with Chase's criteria for prescribing what qualified a loan applicant for a particular financial product.

If a loan did not meet the guidelines, underwriters had some ability to make an exception by applying specific factors.

Chase classified Whalen as exempt from overtime. After four years, Whalen sued Chase for a declaratory judgment he had been misclassified.

A federal appeals court ruled in favor of the employee.

In finding Chase misclassified Whalen as exempt under this category, the court cited the regulation's explanation distinguishing between work directly related to the business's administrative operations and "production" work.

The Second Circuit found Whalen performed day-to-day production activities, which aren't exempt.

Whalen's primary duty was to sell loan products under Chase's detailed directions, which called for "yes" or "no" answers, the court said.

There was a certain amount of discretion and independent judgment involved in Whalen's job, but he didn't advise customers as to what loan products best met their needs and abilities.

Also indicative of Whalen's non-exempt status was the fact that as an underwriter, he was occasionally paid incentives to increase the amount of loan decisions he made.

Paying production incentives to underwriters showed Chase believed the underwriters' work could be quantified in a way administrative employees' work cannot, the court said.

Cite: *Whalen v. J.P. Morgan Chase & Co.*

Advertising salesperson wasn't exempt

Here's another eye-opening example of how the court's interpretation of exempt/nonexempt as it pertains to the the administrative exemption.

Lynore Reiseck worked as a regional director of sales for Universal Communications of Miami, selling advertising space for Universal's Elite Traveler magazine.

The magazine was distributed on a complimentary basis, so Universal's revenue depended greatly on advertising sales.

As regional director of sales, Reiseck was responsible for generating sales in the northeastern U.S. and Canada for the magazine's travel and finance sections.

Reiseck was paid a salary plus commission. She worked for Universal from 2002 until she was fired in February 2004. She then sued Universal for unpaid overtime under the FLSA.

There was no dispute Reiseck met the exempt salary test. There was also no dispute she met part of the duties test: She performed non-manual or office work.

The question was whether the work was managerial as opposed to sales, the former being exempt.

The Department of Labor guidelines on its FLSA regulations distinguish between administrative work, which is exempt, and work in sales, which isn't. But the guidelines also state that administrative operations include promoting sales.

In a sense, Reiseck promoted sales when she persuaded customers to buy ad space in the magazine.

An appeals court found that Reiseck's primary duty of selling advertising space to customers didn't relate to the company's management policies – thus, she wasn't exempt from overtime as an administrative employee.

The judge said because advertising sales were a critical source of revenue for Universal, advertising space was Universal's product. Because Reiseck's primary duty was selling this product, she was a sales employee and not an

administrative one.

As for promoting sales, the court ruled that sales promotion consists of marketing activity aimed at promoting sales generally among all customers.

By contrast, a person who makes specific sales to individual customers – as Reiseck did – is a salesperson under the FLSA and is not exempt from overtime, the court said.

Cite: *Reiseck v. Universal Communications of Miami, Inc.*

Sales, administrative position met exemption standards

This case had a more expected outcome: The court found that an employee's administrative and sales duties qualified under the administrative exemption.

Janel Klienpeter began working for Maryland-based Aerotek in March 2007 at Aerotek's Charlotte, North Carolina, office. Aerotek is a professional staffing and recruiting firm.

Klienpeter started as a trainee and was quickly promoted to recruiter, which paid $33,000 annually, plus commission.

In March 2008, she was promoted to a higher-level recruiter job, performing the same duties but with a $5,000 raise.

The next month, she was promoted to account recruiting manager (ARM), although she had been doing many of the ARM duties for several months. In addition to recruiting, she began handling account management and sales.

Aerotek classified the recruiting and ARM positions as administrative jobs that were exempt from overtime.

Klienpeter left Aerotek in May 2008. Along with several other former recruiters, she sued Aerotek for overtime.

As is true in many of these cases, salary wasn't an issue. The manager made at least $455 weekly.

The issue was what the Department of Labor (DOL) regulations mean by the other two requirements: The employee's office work is directly

related to company management, and he or she exercises discretion and independent judgment on a day-to-day basis.

The court ruled the account manager met both requirements, and the court granted pretrial judgment for her employer on her FLSA claim.

In the ruling, the court said the recruiter and ARM jobs met the requirements of the administrative exemption and granted pretrial judgment to Aerotek.

The court found Klienpeter's primary duties related to Aerotek's management or general business operations.

She performed work comparable to personnel management and human resources for Aerotek's clients: She interviewed clients, negotiated their pay – including holiday and vacation pay – and helped manage the contractors once they were hired.

She also interviewed job candidates, compared contractors' skills to the applicable job descriptions and determined whether they were a good fit based on her knowledge of the clients – all without immediate direction or supervision.

She could also decide what amount of pay to offer a candidate, including whether to offer pay for holidays and vacation, so long as the offer fell within the margin of profit Aerotek intended to make on a particular position, the court noted.

Cite: *Andrade v. Aerotek, Inc.*

The professional exemption

Here's another area where employers often unwittingly misclassify workers: The professional exemption.

Too many companies mistakenly assume highly-specialized jobs that require an advanced set of skills automatically fall into the exempt professional category.

Not so. DOL says:

- The employee must be compensated not less than $455 per week
- The employees work requires advanced knowledge, is intellectual in character and requires the consistent exercise of discretion and judgment
- The advanced knowledge must be in a field of science or learning
- The advanced knowledge must be acquired by a specialized intellectual instruction.

Bottom line: The professional exemption is intended for employees who do work that requires advanced knowledge – knowledge that's usually gained through the completion of a specialized degree.

Advanced learning and skills, but no degree

Consider the case of Andrew Young, who had 20 years of experience in mechanical engineering when he took a job with Cooper Cameron Corp.

The company made hydraulic power units for oil-drilling rigs. Young worked as a product design specialist – a job that required him to assimilate various specifications into a safe and functional design that met consumer demands, engineering requirements and industry standards.

Young was the principal person in charge of drafting plans for the unit, and his job involved considerable responsibility and discretion.

Before joining Cooper Cameron, Young had worked in the engineering field as a draftsman, detailer and designer. He was also a member of the American Society of Mechanical Engineers, which required three engineers' recommendations.

He had graduated from high school and taken courses at various universities, but he never obtained a college degree.

Cooper Cameron paid Young a salary of $62,000 a year and classified him as a "professional" employee who was exempt from overtime under the FLSA.

Three years after joining the company, Young was laid off as part of a reduction-in-force. He sued Cooper Cameron, claiming the company had

"improperly and willfully" classified him as an exempt professional.

The company explained it had gone through a detailed analysis before determining the job was exempt from overtime. The position required 12 years of experience, a high degree of specialized skills, and the exercise of discretion and judgment.

The court disagreed, giving two reasons:

1. Young didn't have an advanced degree in engineering, and
2. His job didn't require an advanced degree.

The court said a position can't be exempt when it doesn't meet the educational requirement, even if employees must have knowledge gained from an advanced type of learning to perform the job.

Moreover, no one in the position at Cooper Cameron had more than a high school education – which indicated that no particular kind or amount of education was required.

Cite: *Young v. Cooper Cameron Corp*.

Incentive pay

Firm overpaid bonus? Tried to get it back with salary deductions

Most employers use bonus plans to help spur better performance – especially for managers. But this case shows why employers should be careful about how they draft the plans.

The case involved performance-based bonus plans that Life Time Fitness, a Minnesota-based chain of health and fitness clubs, offered to senior managers who ran the membership, spa and cafe departments.

Under Life Time's corporate bonus pay plan, the managers received a predetermined base salary on a semi-monthly basis and were eligible to receive monthly bonuses based on specific performance levels.

The bonus plan also allowed the company to make deductions from managers' paychecks for earlier-paid bonuses when managers' performance

fell below pre-set levels.

The company made the deductions three times in the course of a year.

Several managers sued, claiming the deductions negated their exempt status – thus making them eligible for overtime worked during the time the bonus policy was in effect.

The court agreed.

The deductions Life Time took from the managers' guaranteed salaries were not for loan advances or mistaken wage payments, the court said.

The deductions were taken to recoup bonuses Life Time paid the managers in advance if their later performance fell below a certain level, and the FLSA doesn't allow "the reduction of guaranteed pay under a purposeful, incentive-driven bonus compensation plan."

The bonus plans violated the FLSA because they allowed the company to take deductions from a manager's regular salary based on his or her failure to perform up to a certain level, the court ruled.

Thus, the managers weren't exempt – and the company was on the hook for overtime worked during the period the bonus policy was in effect.

Cite: *Baden-Winterwood v. Life Time Fitness, Inc.*

Exempt's incentive pay can be adjusted

As the previous case illustrated, the FLSA says an employer cannot classify an employee as exempt, if the employer takes deductions from the employee's regular paychecks when performance levels fall.

What the employer can do is this, according to a federal appeals court:

Pay the employee a predetermined salary of at least $455 per week, plus an additional amount on a quarterly basis as an incentive to take on more work.

The employer may raise or lower the additional pay for errors the employee makes, so long as the decision to reduce the amount is made prospectively – in other words, after the errors have occurred.

Homebound Mortgage used a two-part salary scheme like that for its

mortgage underwriters. An appeals court said the scheme was lawful under the FLSA and rejected claims from an underwriter that she was improperly classified as an administrative employee exempt from overtime.

The underwriter, Linda Havey, presented no evidence that Homebound's salary scheme was designed to circumvent FLSA's overtime requirements, the court said. To the contrary, the pay system gave underwriters an incentive to take on larger quantities of work while maintaining standards of care "so they [weren't] receiving additional pay for shoddy work that needed to be done over."

Havey worked for Homebound, a Vermont mortgage brokerage firm. Like the other mortgage underwriters, Havey received a base salary greater than the minimum required under the exemption rules.

Havey met with management on a quarterly basis and could, at that time, agree to increase her base salary by processing more loans each month.

Havey would then agree in writing that, in return for receiving an increased base salary, she would process a certain amount of loans per month. If, during the next quarter, she didn't meet the new quota, or if the loans had an excessive number of errors, Homebound would reduce her base salary for the following quarter.

Regardless of the number of loans an underwriter processed per month, or the number of defective loans she had, Homebound guaranteed it would pay her regular base salary.

After Havey sued for overtime, the court found that Havey was an exempt employee. The judge's reasons:

- Homebound did not reduce pay in the middle of the quarter for that quarter. The decrease was always for the next quarter, and
- An underwriter's base salary never fell below her predetermined annual guarantee.

Cite: *Havey v. Homebound Mortgage, Inc.*

Adjusting base pay

The Department of Labor is highly skeptical of any compensation structure that appears to be designed to avoid paying overtime. One such scheme involves reducing the overall hourly wage so that, when time and a half is calculated, the final paycheck is the same as it would've been if no time and a half was paid.

But the courts have recognized there are situations that warrant an adjustment in the hourly rate. Here's a recent example.

Scheduling request sparks base pay change

A California hospital didn't violate the Fair Labor Standards Act (FLSA) when it reduced the hourly base pay for nurses who wanted to change from eight-hour shifts to 12-hour shifts.

The nurses' pay exceeded minimum wage, and they made the same overall pay for the same hours and duties.

When an employer adopts a different work schedule to accommodate a request by its employees, the FLSA does not bar it from reducing the employees' hourly base pay to keep their overall pay the same – or "budget neutral" – so long as certain conditions are met.

The U.S. Court of Appeals for the Ninth Circuit ruled on the issue.

Nurses at the Pomona Valley Hospital in California asked the hospital to assign them 12-hour shifts so they would have more days off. Previously, they'd worked regular 8-hour shifts.

The hospital granted the nurses' request and set up an optional 12-hour shift schedule, with a pay scheme that reduced the nurses' base hourly pay from $22.83 to $19.57.

Nurses who worked the 12-hour shift received time-and-a-half for the hours they worked in excess of eight per day.

After the system had been in operation for several years, nurse Louise Parth and other nurses brought a collective action against the hospital.

Parth claimed the hospital could not reduce the base salaries of nurses

who changed shifts. She alleged that the lower base salary for nurses who worked the 12-hour shifts was an "artifice" designed to avoid the FLSA's overtime requirements.

She was unsuccessful in court.

The hospital didn't violate the FLSA when it reduced the hourly base pay for nurses who wanted to change from eight-hour shifts to 12-hour shifts, the judge said. The nurses' pay exceeded minimum wage, and they made the same overall pay for the same hours and duties.

The Ninth Circuit said employers covered by the FLSA may create cost-neutral pay plans that lower employees' base hourly rates to accommodate their scheduling desires – so long as the new rate equals or exceeds the minimum wage and the employees receive the same wages as before.

Cite: *Parth v. Pomona Valley Hospital Medical Center*

'Per diem' can't be used in lieu of OT

Here's a classic example of how compensation structures can get employers in trouble.

United Technisource (UTI), a company that matches technical workers with facilities, assigned Timothy Gagnon, who had years of experience in prepping and painting aircraft, with Wing Aviation.

Gagnon signed a contract with UTI, calling for $5.50 per hour in straight time and $20 per hour for overtime. UTI also agreed to pay Gagnon $12.50 for every hour he worked up to 40 hours per week, or a maximum of $500.

The contract referred to this pay as "per diem." The DOL listed $18.32 as the minimum hourly wage for aircraft painters in the area of Texas where Gagnon worked.

About a year after Gagnon began working for UTI, he received a memo with his paycheck, telling him Wing Aviation authorized a $1-per-hour raise in his pay starting immediately.

Instead of applying the $1 raise to the $5.50 per hour, UTI gave him a $1 raise in his hourly per diem and in his overtime rate.

Gagnon later sued, claiming the employer violated the FLSA by not paying him the proper rate for the overtime he worked.

The court agreed, saying the arrangement violated the FLSA because it allowed UTI to avoid paying the craftsman overtime he was due.

The FLSA requires employees who are not exempt from overtime and who work more than 40 hours in a week to be paid one-and-a-half times the regular rate of pay.

That regular rate must reflect all payments the parties have agreed the employee will receive regularly during the work week, exclusive of overtime.

The court said UTI tried to avoid paying Gagnon a higher regular rate by artificially designating a portion of Gagnon's wages as straight time and a portion as per diem.

With his "raise," Gagnon's hourly regular rate for 40 hours of work would come to $19 – meaning his overtime rate should have been $28.50. But UTI only paid Gagnon $20 an hour for OT.

The judge awarded Gagnon all his back pay for overtime, then doubled the amount because the violation was willful.

Cite: *Gagnon v. United Technisource Inc.*

Digital-age FLSA pitfalls

Add technology to the list of things that can trip up employers trying to comply with the FLSA.

For example: When an employer pays the amount of hours an employee enters on his or her written time sheet, that pretty much protects it against any wage-and-hour liability, right?

Well, not if the employer tracks the worker's cell phone use or GPS and is aware of work hours the employee simply didn't report.

Didn't ask for OT, but is owed it anyway

Steven Frew was a full-time field service technician for Tolt Technologies, which repairs cash registers, printers and other point-of-sale equipment for retail clients.

His job required him to travel from his home to clients' businesses to repair or maintain equipment. He didn't have an assigned starting time, but he was responsible for entering his hours onto a computer time sheet each day.

After he stopped working for Tolt, Frew sued under the FLSA to recover what he said was unpaid overtime. Frew claimed he reported working between 40 and 45 hours per week even though he really worked between 45 and 55 hours per week.

He admitted he didn't keep track of his hours and that he was paid for the overtime he did report. But he said he didn't report all his overtime because he was expected to finish his service calls during a normal work day and because his evaluations were partially based on him doing so.

He also said that for most of his two years at Tolt, he regularly made service calls during his 30-minute lunch break. He and another field technician testified Tolt required them to report a 30-minute break on their time sheets even though they worked through lunch.

Frew also claimed he wasn't paid for service calls he took on his cell phone before he clocked in.

Testimony from Frew and other technicians suggested Tolt frequently verified their work hours by checking the GPS in their service truck.

The judge ruled Frew could go to trial on his claim for unreported overtime, even though he got paid for all of his reported overtime.

The court said even though Frew admitted no one forced him to work through lunch, a jury could find Tolt knew he did and allowed the work to go unreported and unpaid.

So the case was allowed to proceed – meaning the employer was facing either a lengthy, expensive trial or an expensive settlement.

Cite: *Frew v. Tolt Technologies Service Group, Inc.*

What's integral and what's de minimus?

Here's where Information Technology and the FLSA can collide.

If employees are required to use electronic infrastructure to perform job duties, the company may be on the hook for the time the equipment isn't working properly.

Mike Rutti, a technician for vehicle-locator company LoJack, sued for overtime pay for his commute to and from work and for certain "off-the-clock" activities.

The court dismissed his claim for OT for his commute, citing the Portal-to-Portal Act, which doesn't require an employer to pay an employee for time spent commuting when the employee is required to drive a company car to and from his principal activity.

But the court found Rutti's "post-work" activities to be compensable.

During the day, Rutti had to record information about the work he performed on a portable data terminal (PDT).

When Rutti got home, he had to upload the data by connecting the PDT to a modem at home and then proceeding to transmit the required information to Lojack.

Lojack did not pay overtime for this work, claiming it was an unavoidable duty that was minor and "de minimus," no different than say, going around and shutting off the lights.

But Rutti often needed to try a few times before the transmission was successfully made.

The problem was he could only attempt to make the transmissions at certain times, and had to wait a full hour to try a transmission again if it was unsuccessful.

For the time it took Rutti to successfully transmit the information to be compensable under the FLSA, this activity had to be "integral" to his principal activity and not "de minimis."

The evidence showed Rutti met this two-part test, the court said.

As for the "integral" component, Rutti was required to transmit the

data at the end of every day for LoJack's benefit. And there was evidence it took him about 15 minutes every day – more than an hour a week – indicating the time spent doing so was not de minimis, the court said.

So this case, too, was sent back to a lower court – and the employer was again faced with the choice of an expensive trial or an expensive settlement.

Cite: *Rutti v. LoJack Corp.*

About PBP Executive Reports

PBP Executive Reports are straightforward, fast-read reports for time-pressed upper-level executives and managers. PBP Executive Reports excel at cutting the fluff, eliminating jargon and providing just the information today's executives need to improve their organizations' performance.

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