



# THE IMPORTANCE OF EMPLOYEE TIME MANAGEMENT

Avoid “off the clock” work claims through good recordkeeping

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By **JEFFREY H. RUZAL**

‘Tis the season for an influx of guests and visitors to your properties and, most likely, a greater number of hours logged by your non-exempt staff and seasonal workers. High season business is always welcome, but owners and operators must be mindful of the potential legal risks attendant to operating with a larger headcount and greater number of work hours.

“Off the clock” work is a familiar term in wage and hour law, which refers to non-exempt employees who perform work that is not recorded or paid. Off the clock work most often occurs at the beginning and end of employee shifts, during rest and meal breaks, as well as night and weekend work. Off the clock legal claims and investigations are of the most pervasive in wage and hour law, and they are very difficult to defend against in the absence of clear and exacting policies requiring employees to record all work time, including work performed outside employees’ normal work hours or outside the workplace.

The Fair Labor Standards Act (FLSA) provides that employers must compensate non-exempt employees for all of their work hours, and that they must maintain accurate and contemporaneous records of all hours worked. The law provides that if employers fail to maintain accurate and contemporaneous records, employee testimony concerning their best recollection of their work hours will be credited, and then the burden will shift back to employers to prove that the employees’ best recollection is inaccurate. Without records,

it is very difficult to rebut employee testimony, especially in multiple plaintiff or class action lawsuits where employees can corroborate each other’s testimony. It is the employer’s burden to ensure that all non-exempt employees’ work time is recorded; however, employers can require employees to actually account for their own time. In fact, this practice is preferable because the employees are effectively verifying their own time by actively recording it. By requiring employees to accurately record all of their work time employers can protect against potential claims that an employee worked off the clock.

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The FLSA does not require a particular method or form of recording employee worktime; however, it is always best practice that such time be recorded in a way most convenient and accessible for the employer. Employers can almost never go wrong with a time clock that is conveniently located so that employees can clock in and proceed directly at work at the beginning of the work day and, on the other end, conclude work for the day, clock out, and leave for the day.

To the extent that any employees are required to don and doff

any particular uniform, gear, personal protective equipment, or even perhaps a costume, it is important that employees are instructed to, and managers are trained to enforce the practice of, clocking in first, and then changing into the required clothing or equipment. The same practice should apply at the back end where employees change out of the clothing or equipment and then clock out. Unless the donning and doffing time is *de minimis*, meaning no more than a couple of minutes, donning and doffing time is often compensable under the law. There are circumstances where donning and doffing time is not compensable, but it is important that employers consult with a wage and hour attorney before deciding to not compensate for donning and doffing time. The decision requires a rigorous legal analysis, and is very fact dependent.

Recordkeeping practices must also be enforced for home and virtual work. Smartphones, home computers, and virtual networking has allowed employees to seamlessly work outside the workplace, which can create potential risk for off the clock work claims. It is therefore important that employers put in place policies to ensure that all work performed outside the workplace is accurately recorded. If it is too difficult to enforce this policy or account for all of the work time, employers can alternatively prohibit the performance of any work outside the workplace. This latter policy may make sense for certain occupations that need to be performed onsite, such as kitchen workers or front desk

personnel; however, it may be less feasible for other types of positions, such as assistant managers, that may need to be responsive at all hours of the day.

Finally, employers should also maintain a strict policy that, once clocked out at the end of the day, employees are required to leave the workplace. It is commonplace for employees to stay on premises to wait for colleagues or socialize; however, allowing employees to do so is a dangerous practice because it allows employees to claim that they were performing work after they clocked out.

Recordkeeping is always the best practice, and it is the only effective way to defend against challenging off the clock work claims. Be sure to be vigilant. **ht**



#### ABOUT THE AUTHOR

**Jeffrey H. Ruzal** is a co-editor of Epstein Becker Green’s *Hospitality Labor and Employment Law Blog* and its award-winning *Wage & Hour Defense Blog*, as well as an Editorial Advisory Board Member of *Hospitality Law Magazine*. He is also a contributing author to *Lexis Practice Advisor* on wage and hour topics. In addition, Mr. Ruzal represents Epstein Becker Green on The Cornell Institute for Hospitality Labor and Employment Relations Advisory Board.

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