Work Overtime to Ensure That Your Unauthorized Employees Do Not

By Michael C. Schmidt

Consider the following hypothetical scenario:

- Your company policy states that a non-exempt employee cannot work overtime, unless the employee receives prior written approval.
- Your company policy says that an employee who works overtime that is not authorized can be subject to discipline up to, and including, termination of employment.
- Your company did not believe that its non-exempt employees worked overtime hours.
- The overtime hours worked by non-exempt employees were unauthorized.
- Your company is found liable for significant unpaid overtime wages.

This situation is not far fetched, particularly after the federal Court of Appeals in New York ruled earlier this year that an employer cannot necessarily avoid liability for overtime wages — even if its policy requires prior approval for overtime work, and even if the employer did not have actual knowledge that its employees were working overtime hours. This article looks at the surge in overtime litigation, the court's recent decision and steps for limiting your company's potential exposure.

A Surge in Overtime Litigation

As we have passed the mid-way point of 2008, it is clear that wage and hour lawsuits continue to dominate a large portion of all new cases filed in court each day. This noticeable surge will continue, if not further increase, as current and former employees claim in increasing numbers that they have been classified improperly as "exempt" employees, and thus are owed overtime premium pay. These cases are often prosecuted through class action lawsuits, where the existence of multiple plaintiffs raises the potential for significant exposure to the employer.

In 2008, the ever-changing nature of the workplace and the workforce also has contributed to the wide spectrum of issues facing employers, and the increasing number of overtime lawsuits being filed. In years past, an employer had an easier time controlling its employees and hours worked when the work performed generally was confined to the nine-to-five workday and within the walls of the employers' office. In those circumstances, when employees were there to be seen, employers could strictly enforce anti-overtime policies and monitor the hours worked by its employees.

However, technology has torn down the office walls, making anywhere and everywhere in the world a virtual cubicle. Employees not only have greater access to company documents and e-mail from home computers, but Blackberries and similar devices allow employees to remain connected with the office and with clients day and night. Coupled with the increasing number of employees allowed to telecommute, it is practically impossible for your company to control, let alone know about, all hours in which employees are performing work for the company. Indeed, the fact that employees in financial services and sales-related industries often receive their compensation in the form of commissions provides its own incentive for employees to work as many hours as possible without the encumbrance of the typical workday or office walls.

New York Federal Court-Payment Required for Unauthorized Overtime

On Jan. 24, 2008, the Court of Appeals for the Second Circuit in New York issued its long-awaited decision in Chao v. Gotham Registry, Inc., in which the Secretary of the United States Department of Labor brought an action against a nurse staffing agency for an alleged failure to pay for overtime hours worked by the nurses placed with requesting hospitals. After placement by the staffing agency, the nurses reported directly to the hospital and signed in and out on daily time sheets that were compiled and reviewed by the hospital. Notably, the staffing agency was "not permitted to go on hospital premises to verify the nurse's hours or otherwise supervise his or her performance."

The hospital paid the agency a fee based on the number of total hours worked by the particular nurse, and, in turn, the agency paid most of that fee to the nurse. However, the fee paid by the hospital to the agency did not change depending on whether the nurse had worked fewer or more than forty hours in a particular workweek, even though the hospital occasionally asked the nurses to work overtime. The court in Gotham noted that the agency itself maintained an overtime policy that required prior notification to, and authorization from, the agency before a nurse would be paid premium rates for overtime worked. Despite that policy, nurses often did not request approval from the agency to work overtime, and those that did were denied authorization more than they were approved. The agency ultimately refused to pay overtime premium pay to those nurses who worked overtime hours that were unauthorized.

The court held that unauthorized overtime constitutes "work" that must be compensated. Thus, an employer who has "actual or imputed knowledge that an employee is working" must compensate the employee at a rate of time and one-half for overtime hours worked, even if the employer acquires such knowledge at some point after the work is performed. The court stated:

An employer who has knowledge that an employee is working, and who does not desire the work be done, has a duty to make every effort to prevent its performance ...

This duty arises even where
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the employer has not requested
the overtime be performed or
does not desire the employee to
work, or where the employee
fails to report his overtime hours.
The import of the decision in
Gotham is that an employer cannot
turn a blind eye to after-hours and
off-premises work it knows, even
constructively, is being performed.
The Second Circuit has now stated
clearly that a company has a duty to
compensate its non-exempt em-
ployees for overtime work about which it
knew or had reason to know.

But, what about the company pol-
cy prohibiting unauthorized over-
time? The court in Gotham next
addressed this issue. Consistent with
the state of the law in other discrim-
ation and harassment contexts, the
court reaffirmed that the mere prom-
ulgation of a policy prohibiting au-
thorized overtime is insufficient
alone. Rather, the staffing agency
was held to a standard requiring it
to "adopt all possible measures to
achieve the desired result." The evi-
dence presented established that
employees who disregarded the
prior approval policy generally did
not face any adverse consequences,
while employees who disregarded
other company policies were in fact
disciplined. Therefore, there was no
evidence that the agency sought to
monitor or imposed any conse-
quences for violations of its stated
overtime policy.

From an equitable standpoint, a
company is not likely to garner much
judicial sympathy for failing to pay
overtime when it had the power to
prevent the overtime work from
being performed and ultimately ben-
efited from the overtime work. The
presumption will arise that "an
employer who is armed with know-
ledge has the power to prevent work
it does not wish performed."

Steps for Minimizing Exposure
Your company cannot ignore the
strict requirements pertaining to
employee wages and hours. The
court’s decision in Gotham is impor-
tant for its pronouncement on a
company’s obligation to pay overtime
even for unauthorized overtime
worked. However, the decision takes
on a larger significance for most com-
panies in New York, and could for
other organizations nationwide,
because the company in Gotham: 1) had even less control than the typical
organization would have over its
employees and the hours worked; and
2) seemingly received no benefit from
the overtime work, and instead had to
bear the cost, since the nurses worked
directly for the hospital, and the hospi-
tal did not provide added fees to the
agency if a nurse worked overtime.

It should be beyond cavil by now
that an employer can never complete-
ly eliminate the possibility of a lawsuit.
Still, there are pro-active steps that
your company can take to minimize
the potential exposure in any lawsuit.
First, create a well-defined overtime
policy (or review and revise any exist-
ing policies) that is distributed and
communicated to all employees. It is
not enough simply to create a policy
—it is imperative that your policy be
communicated through regular meet-
ings with employees, and regular dis-
tribution (and employee acknowledge-
ment) of the company’s policy.

While the Gotham case demon-
strates that an employer may be
required to pay overtime premiums
even if the overtime work is not
authorized, an employer can discipline
and even terminate an employee for
performing unauthorized overtime.
Issues such as the scope of what con-
stitutes “work” for your particular com-
pany, and how the company treats
meal breaks, travel time, and “on call”
time also should be carefully consid-
ered and defined to ensure that the
correct wage rates are used for each
employee, and that the correct amount
of working time is compensated.

Secondly, say what you mean and
mean what you say. If your company
maintains a policy that employees
should not work after hours, then you
should not create a culture where
employees feel as if they are expected
to “check in” at all hours through home
computers or Blackberries. A good
indication that an employee may be
working off hours is if one of your
supervisors receives a return e-mail
message late at night or on the week-
end. Employers also should be aware
of the production of its employees,
since certain high levels of productivity
may be indicative of extra work being
performed outside the company’s
office. Companies and their in-house
counsel must ensure that any overtime
policies maintained are enforced con-
sicently and indiscriminately.

Third, verify that the appropriate
classifications are made and that the
appropriate records are maintained
supporting the proper wage classifi-
cations for employees. The number of
administrative audits and federal law-
suits challenging employee exempt
status is on the rise, and your organ-
ization should be in the best position
to produce proper documentation in
defense of an audit or lawsuit.

Last, and similarly, consider institut-
ing a documentation procedure for
non-exempt employees, so that your
company can better track (and better
defend itself against) the number of
hours an employee later claims he or
she worked. Employers often walk the
fine line between the hope of avoid-
ing the lost morale associated with
“big brother” watching and the need
to protect against employee claims.
However, in light of today’s changing
workforce, from the standpoint of
increased use of technology and more
time spent outside the traditional
office, consider a requirement that
employees provide written certifica-
tion, for example, at the end of each
pay period attesting to: 1) the number
of hours worked during that period;
and 2) the fact that the employee did
not work more than 40 hours during
that period. Such a certification will
not eliminate the potential for an
employee to claim in a subsequent
lawsuit that hours were worked in
addition to those identified on the cer-
tification. However, a contemporane-
ous certification completed regularly
by the employee may bolster your
company’s defense of that claim.

Conclusion
Wage and hour lawsuits will, for
the foreseeable future, continue to
consume federal courts and expose
employers to a growing number of
issues that will reflect the evolving
workplace and workforce. But, by
tackling these issues head on in
advance, your company will be best
equipped to minimize potential
exposure.