

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 so 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

Michael C. Schmidt is a member of the labor & employment practice group at law firm Cozen O'Connor (www.cozen.com), practicing in its New York City and Long Island offices. Schmidt has represented employers, from Fortune 500 companies to mom-and-pop shops, in overtime matters and counseled them on overtime exemption and classification issues. An adjunct professor teaching employment law at Touro Law School in Central Islip, NY, he can be reached at 631-694-8004 or 212-453-3937 or at mcschmidt@cozen.com

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 employees for overtime work about which it knew or had reason to know.

But, what about the company policy prohibiting unauthorized overtime? The court in *Gotham* next addressed this issue. Consistent with the state of the law in other discrimination and harassment contexts, the court reaffirmed that the mere promulgation of a policy prohibiting unauthorized 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 evidence 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 consequences 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 benefited from the overtime work. The presumption will arise that "an employer who is armed with knowledge 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 important for its pronouncement on a company's obligation to pay overtime rates even for unauthorized overtime

worked. However, the decision takes on a larger significance for most companies 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 hospital 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 completely 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 existing 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 meetings with employees, and regular distribution (and employee acknowledgment) of the company's policy.

While the *Gotham* case demonstrates 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 constitutes "work" for your particular company, and how the company treats meal breaks, travel time, and "on call" time also should be carefully considered 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 weekend. 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 consistently and indiscriminately.

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

Last, and similarly, consider instituting 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 avoiding 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 certification, 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 certification. However, a contemporaneous 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.

