

## Off-Duty Electronic Device Use and an Employer's Defense to Overtime Liability

Although the Department of Labor's FLSA enforcement frenzy has abated as a result of the Trump presidency, important issues are still being resolved in the area of overtime litigation.

On August 3, 2017, the United States Court of Appeals for the Seventh Circuit affirmed a district court decision in the case of [Jeffrey Allen v. City of Chicago](#) that held that certain Chicago police officers were not entitled to overtime pay for Blackberry usage because the officers failed to report that usage on their overtime slips.

In the Allen case, certain elite police officers who are members of the CPD's Bureau of Organized Crime were issued Blackberrys which they used for off-duty work. The CPD allows officers to obtain overtime compensation by submitting "time due slips" to their supervisors for work performed. Supervisors approve the time, and the slips are sent to payroll and processed. During the period of 2011 through 2014, fifty-two plaintiff/police officers reported and received pay for 3,000 - 4,000 overtime hours per year. But during this same period, many officers did not submit slips for off-duty work done on Blackberrys.

The central question at trial was whether the Bureau had an unwritten policy that prevented or discouraged officers from submitting overtime slips for Blackberrys. The court analyzed four separate arguments by the plaintiffs and concluded that the CPD did not have an unwritten policy that discouraged the reporting of overtime pay for Blackberry usage. The court held additionally, that the City could not be found liable for overtime that it never knew about, i.e., that was never reported on its time slips.

### **Do Not Misconstrue the Allen Decision!**

The Allen decision did not hold that off duty work on Blackberrys or cell phones is not compensable work. Similarly, the court did not hold that

the amount of time that the officers spent on their Blackberrys was diminished. Instead, the Allen holding was that the City of Chicago could not be held liable for work where it did not know, nor did it have reason to know, that officers were not submitting slips for Blackberry usage.

### **The Takeaway From Allen.**

Employers that do not know that their employees are working overtime off duty are at risk. The best way to reduce the risk is to eliminate the off-duty overtime work. Absent that, the Allen decision teaches that employers should have an easily accessible, well-publicized means for employees to report overtime work, and employers should do nothing to discourage such reporting. (Which is different from discouraging off-duty overtime). If employees have an accessible means for reporting overtime and fail to use it, an employer may have a defense that it did not know nor did it have reason to know about the overtime work performed

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