

# Wage & Hour Insights

Guidance & Solutions for Employers



## **Even Best Practices Can't Always Ensure Quick Dismissal of Wage & Hour Claims**

By Bill Pokorny on November 07, 2011



You're a savvy employer. Your timekeeping policies are clear. Your employees know that they are required to report all of their work time. Employees sign off on their time records each week. You even provide a procedure for employees to confidentially report any improper actions by their supervisors. Your records are complete, organized, and show that you've fully compensated your employees for all reported work hours. But what happens when an employee claims that his supervisor instructed him not to report overtime unless it was authorized in advance, and to record unpaid lunches even on days that he worked through his lunch break? As a recent ruling from a federal district court in Idaho illustrates, even following best practices with respect to recordkeeping compliance won't necessarily preclude an employee from taking a claim for unpaid overtime to a jury.

In [Covert v. ITT Educational Services, Inc. d/b/a ITT Technical Institute](#), plaintiff Robert Covert worked for [ITT](#) as a recruiter / admissions representative from November 2007 through March 2010. Covert alleged that he frequently worked over his lunch hour and beyond his scheduled shift, but that he and his co-workers were told by their supervisors to keep track of overtime separately from regular hours, and that they would receive "comp time"\* for the overtime hours. If overtime hours were reported on a timecard, Covert claimed that his supervisors instructed him to edit his time card to remove the overtime. If he did not, his supervisors would not sign the timecard and he would not be paid. ITT moved for summary judgment, pointing out that:

- ITT maintained a policy requiring Covert to accurately record his time and request overtime in advance;
- Covert admitted that the timecards were accurate as to recorded vacation, sick, and holiday time, and even some instances of pre-approved overtime;
- Covert knew that he could confidentially report improper actions by his supervisors;
- Covert never made any such report; and
- Covert signed off on his timecards each week.

Additionally, ITT pointed out that Covert previously signed a sworn declaration in a prior lawsuit, in which he testified that his time cards were accurate.

Despite this, the District Court held that Covert presented enough evidence to take his case to a jury, including his own deposition testimony and corroborating statements from several employees. While the jury will be free to consider the evidence presented by ITT and might very well conclude that

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Covert's claims are not credible, the court found that ITT's evidence was not sufficient to entitle it to judgment without a trial.

## Insights for Employers

Sometimes, even the best preventive medicine isn't enough to keep you from getting sick. The same goes with respect to wage and hour claims. If the descriptions in the court's opinion was accurate, it appears that ITT did a lot of things right. Unfortunately, one of the realities of litigation is that a court can't step in and dismiss a case before trial if there are issues of credibility or other factual disputes that could affect the outcome.

That being said, many of the steps that ITT apparently took may ultimately help it prevail at trial, so those efforts should not be seen as futile. Measures to consider for your workplace include:

- Adopt and communicate clear policies requiring employees to accurately report their work time and prohibiting "off the clock" work.
- Make sure your time records are complete and accurate for all non-exempt employees.
- Have employees review and sign off on their time records each week.
- Provide a mechanism for employees to report improper actions by their supervisors, such as directions to work "off the clock" or work through lunch. Of course, prompt follow-up on such reports is essential.
- Educate your supervisors on wage and hour law, and take great care to ensure that they do not confuse the perfectly legal practice of controlling overtime hours with the prohibited practice of requiring employees to work overtime hours without pay.
- If claims of "off the clock" work do arise, contact your legal counsel *immediately*, and work with them to determine if you should work to secure declarations from employees confirming the accuracy of their time records.

Taking steps such as these may not eliminate wage and hour claims or even allow you to obtain dismissal of all such claims without a trial, but they can help.

\*"Comp time" generally is not allowed as a substitute for overtime pay outside of the public sector, except in the limited sense of allowing an employee to take time off within a single workweek to keep his or her total hours *for that week* below 40.

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