Tenth Circuit Indicates Mandatory Pre-Shift Briefings Are Compensable Time Under the FLSA

On September 14, 2017, the Tenth Circuit Court of Appeals provided employers with further guidance regarding the compensability of pre-shift tasks under the Fair Labor Standards Act ("FLSA"). Specifically, in **Jimenez, Bustillos, et al. v. Board of County Commissioners of Hidalgo County** (Case No. 15-2213, Sept. 14, 2017), an unpublished decision, the court held that emergency 911 dispatchers who are required by the employer to participate in mandatory pre-shift briefings for five minutes before each shift must be compensated for that time.

The district court had granted the employer summary judgment on all of the emergency workers' FLSA claims for unpaid overtime. The plaintiffs alleged that detention workers and 911 emergency dispatchers were not paid for pre- and post-shift briefings, pre- and post-shift tasks, and for "on call" time. Here, the Tenth Circuit carved out just the 911 dispatchers' pre-shift briefing time of five minutes per shift, explaining that "the regulation allowing an employer to disregard insubstantial and inconsequential amounts of time 'applies only where there are uncertain and indefinite periods of time involved of a few seconds or minutes duration.'" In this case, because the county, by its written policy, required dispatchers to be at work five minutes before every shift, that was sufficient for the court to conclude that this pre-shift time was a "fixed or regular working time" and a "practically ascertainable period of time [s]he is regularly required to spend on duties." In so holding, the Tenth Circuit affirmed the district court's opinion in all respects but for this one point, finding that it is "integral and indispensable" for the principal activity for which the 911 dispatchers were engaged, to obtain this information before starting their shifts.

First, it is interesting to note that the Tenth Circuit did not apply the U.S. Supreme Court's Integrity Staffing v. Busk, 135 S. Ct. 513 (2014) (holding that for a pre- or post-shift activity to be compensable under the FLSA, it must be an "intrinsic element" of the job). Second, by affirming the district court's opinion that the remaining pre- and post-shift tasks and "on call" call time were not compensable, the court provides employers with some guidance that those tasks are indeed not compensable under the FLSA, absent the circumstances noted above (but remember, state laws may be more stringent). Third, without explaining its reasoning and deferring to the underlying court's justifications, the court's holding applied only to the 911 dispatchers and not the detention officers, presumably because of the unique circumstances noted above. Finally, the court endorsed the notion that in the absence of an employer's records relating to an employee's purported off-the-clock work, the employee's estimate of time worked may constitute sufficient evidence as to how much unpaid time they worked, applying the "just and reasonable inference" standard of proof set forth in a 2016 U.S. Supreme Court case involving Tyson Foods.

As always, wage and hour compliance remains complex and multifaceted, particularly with the overlay of different state laws across jurisdictions, necessitating constant vigilance to myriad potential off-the-clock risks. However, last week's Tenth Circuit opinion provides some helpful guidance for employers, especially in situations where employees are regularly required to show up early and work off-the-clock for a practically ascertainable period of time.

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This document is intended to provide you with general information regarding the Tenth Circuit's holding concerning the compensability of pre-shift tasks under the FLSA. The contents of this document are not intended to provide specific legal advice. If you have any questions about the contents of this document or if you need legal advice as to an issue, please contact your regular Brownstein Hyatt Farber Schreck, LLP attorney. This communication may be considered advertising in some jurisdictions.