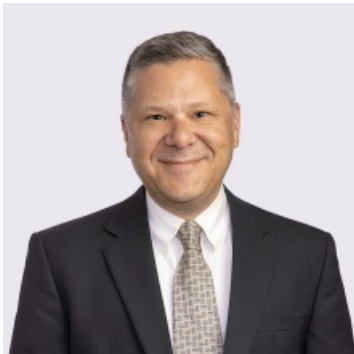


Seventh Circuit: Employer May Place Conditions on Paying for Non-Compensable Off-the-Clock Work

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Wage and Hour

If an employer adopts a contract or custom of paying employees for pre- or post-shift activities that are not otherwise compensable under the Fair Labor Standards Act (FLSA), it can impose conditions on such pay, including requiring employees to record the time worked on those activities, the U.S. Court of Appeals for the Seventh Circuit held. *Meadows v. NCR Corp.*, Nos. 21-3309 & 22-1383, 2023 U.S. App. LEXIS 26442 (Oct. 5, 2023).

The appeals court adopted a narrow view of when an employer must pay for an employee's pre- and post-shift activities. It found the activities in this case were merely incidental to the employee's commute and not integral and indispensable to his principal activities. Consequently, the activities were compensable only if the employer had adopted a contract, custom, or practice of payment (an exception to the principle that, under the FLSA, activities "preliminary to or postliminary to" principal activities are not compensable). In this case, the employer's practice of paying for off-the-clock incidental activities was contingent on employees recording their time spent on those activities, a requirement that the district court erroneously disregarded. Therefore, the appeals court vacated the lower court decision denying the employer's motion for a new trial following a jury verdict for the plaintiff on his overtime claim.

The Seventh Circuit has jurisdiction over Illinois, Indiana, and Wisconsin.

Unauthorized, Unrecorded Overtime

The plaintiff, Michael Meadows, worked as a customer engineer (CE) for NCR Corp., servicing the company's point-of-sale systems and ATMs in the field. NCR's written policy instructs CEs to record their time electronically and states that CEs are to work only during their regular shifts; off-the-clock work is prohibited. However, if a CE works overtime despite this policy, the company pays for the overtime — provided the employee records the time in the timekeeping system.

Meadows performed pre- and post-shift activities and work activities during unpaid meal periods. These included reviewing email, mapping the service route, reviewing work orders, responding to work calls, and making sure his company-provided van was stocked with needed parts. In accordance with its practice, NCR paid him for unauthorized overtime that he recorded. However, he was not paid for time he did not record.

Meadows sued under the FLSA and Illinois Minimum Wage Law seeking compensation for his unrecorded overtime. After initially certifying the case as a collective action, the district court decertified the collective in a 2020 decision. It found the CEs' reasons for allegedly working off the clock, and the type of off-the-clock work they performed, varied considerably, precluding collective treatment.

Incidental Work

The district court concluded Meadows' off-the-clock activities were not integral and

indispensable to his principal activities of servicing NCR systems; rather, it found they were incidental to his commute in a company vehicle. The court explained, “As in other industries that employ technicians in the field, some basic, but necessary, tasks to get to those assignments are merely preliminary (or postliminary) to the principal activity of field service.”

However, the court said the time may be compensable if the CE could prove that NCR had a practice of paying for the incidental activities. At issue was FLSA Sec. 254(b), which provides that otherwise non-compensable preliminary or postliminary activities are compensable if the employer has agreed to pay for them through an express contractual provision or through “a custom or practice in effect [] at the time of such activity.”

The company handbook stated that pre- and post-shift activities should take only one to two minutes. It also unequivocally stated that, if those activities take longer, the CE is expected to record that time for the purpose of NCR compensating them for that work. This, along with other evidence, raised an issue of material fact about NCR’s custom and practice of paying for pre- and post-shift activities that take a CE more than 1-2 minutes to complete, the court found. Therefore, the court denied NCR’s motion for summary judgment.

Following trial, the jury rendered a verdict for Meadows. The court denied NCR’s motion for a new trial. In the district court’s view, “NCR could not escape liability by imposing a recording requirement on its custom of paying for [] incidental activities because NCR had constructive knowledge of those activities.”

Employer’s Practice Required Recording Time

On appeal, the Seventh Circuit panel held the district court erred in “casting aside” NCR’s policy that incidental activities must be recorded in order to be compensated. If NCR had any “custom or policy” for Sec. 254(b) purposes, it was a policy of paying for incidental activities only when the time was recorded. The Seventh Circuit said the district court erroneously concluded that “since NCR chose to compensate these activities in one instance, it had to compensate them in all instances.”

Under Sec. 254(b) the employer, at its own discretion, chooses to adopt a practice of compensating employees beyond that required under the FLSA, the appeals court stressed. An employer may place conditions on such compensation, such as requiring employees to record their time. Here, the requirement that time be recorded was “inextricable from the custom or practice itself,” the appeals court wrote. It added that failure to acknowledge the requirements of an employer’s policy “would turn an employer’s discretion to pay for incidental activities into a trap, with the predictable consequence that employers will cease paying for incidental activities altogether.”

In addition, NCR had argued below that even if the time were compensable, the company could not be liable because it had no knowledge of Meadows’ unrecorded work. The district court rejected this defense, concluding that NCR could have had constructive knowledge that he performed incidental work off-the-clock. But the lower court should not even have addressed this issue, the appeals court held, explaining that “[i]f an incidental activity is not compensable[,] then an employer’s knowledge that an employee is performing that activity is irrelevant.”

Takeaways

The Seventh Circuit agreed that checking email, mapping a service route, and similar off-

the-clock activities were not directly related to a CE's principal activity of servicing the company's equipment; they were incidental to commuting in the field. Therefore, the time was not compensable.

The appeals court also made clear that if an employer adopts a custom or practice of compensating employees for otherwise non-compensable activities at its own discretion, it may impose conditions on that compensation as part of its custom or practice — including the requirement that employees record the time in question.

Finally, the appeals court articulated the common-sense notion that if activities are not compensable, it is irrelevant whether the employer had constructive knowledge that its employee was engaged in those activities.

Contact your Jackson Lewis attorney if you have questions about the compensability of pre- and post-shift activities under the FLSA or the state laws of the jurisdictions in which your organization operates.

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