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The FLSA in the Virtual Office: How Employers Can Ensure They Have Fully Compensated Their Non-exempt Employees in the Age of the BlackBerry

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The FLSA in the Virtual Office: How Employers Can Ensure They Have Fully
Compensated Their Non-exempt Employees in the Age of the BlackBerry

By: JoAnne Sweeney and Jessica Linehan*

ABSTRACT

Workplace technology has blurred the lines between time working and time at rest. Employees can use personal digital assistants such as BlackBerries and cellular phones to conduct business even when they are not at the office. Employers, however, are still required under the Fair Labor Standards Act to compensate non-exempt employees for all time spent working even if it is difficult to calculate. This Article presents the inherent legal problems such as whether after-hours BlackBerry use falls under the FLSA requirements, which exceptions to the FLSA can be used by employers, and what practical solutions employers can use to ensure that they are not legally liable for their employees’ after-hours BlackBerry use.

INTRODUCTION

As technology makes running a business easier, it also makes it more complicated. Email and cellular phones make our homes and, indeed, the street we walk on, a mobile office where we are capable of doing meaningful work like responding to correspondence or conversing with clients or coworkers. And if employees are doing work, should they be getting paid for that time?

Under the Fair Labor Standards Act, employees (who are not exempt from its coverage) must be paid for time spent working for their employers.1 Failure to properly compensate non-

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1 For an analysis of which employees can be considered exempt, see Robert L. Levin, Salaried or Hourly: Do Your Exempt Employees Meet the “Salary Test” Under The FLSA?, 11 LAB. LAW 25 (1995).
exempt employees can result in harsh penalties and costly lawsuits.\(^2\) Work done in the office is easy to quantify and compensate for but work outside the office walls and outside office hours is much more difficult. That does not mean, however, that employers are not required to at least attempt to ensure that they compensate their non-exempt employees for all of the employees’ time spent working.

The most recent problem for employers comes in the form of non-exempt employees\(^3\) who are either expected to or who choose to check their work emails, use BlackBerries or other PDAs, or receive and make business calls on their cellular phones outside of the office.\(^4\) Are employers responsible for accounting and compensating for this time? How can this time be measured? Are there any alternatives to this complicated time-keeping activity? In short, what can an employer do to ensure it is not going to be found liable in court for failing to compensate its employees for time spent on a BlackBerry that the employer may not have required or even known about?

Although there has been no major federal court case on this issue yet, at least one employer has proactively sought to account for and reimburse employees for time spent on work-

\(^2\) See, e.g., 29 U.S.C. § 216 (2008) (discussing such penalties, which include both civil and criminal liability penalties). The statute of limitations for breach of the FLSA can be as long as three years for willful violations. Class action lawsuits for larger companies can end with staggeringly high damages awards in the tens of millions. See, e.g., David Phelps, Surge in Wage Suits has Courts on Overtime, STAR TRIBUNE, October 7, 2007, at D1.

\(^3\) The term employee, for the purposes of this Article, means only nonexempt employees who are covered under the Fair Labor Standards Act. It should also be noted that BlackBerry use might affect exempt employees who are on unpaid leave because if they have done any “work” during that time—on a BlackBerry or otherwise—they must receive their fully salary. See Jeffrey M. Schlossberg & Kimberly B. Malerba, Tech-Tock, 237 N.Y. L.J. 9, col. 1 (May 21, 2007).

\(^4\) In the interests of simplicity, the term BlackBerry will be assumed to include the use of any PDA, making or receiving cellular telephone calls, and checking, sending, and responding to emails.
related telephone calls during off duty hours. Unfortunately, there has been very little legal scholarship to delineate the issues involved. This Article attempts to fill this gap. Parts I and II begin by showing that under the Fair Labor Standard Act (FLSA), time spent by non-exempt employees on BlackBerries or cellular telephones which benefits their employers is compensable time spent working. Part III attempts to discern whether there is an exemption or loophole that employers can use to avoid this requirement. Finally, Part IV suggests a strategy employers may use to ensure that their employees are compensated for their time spent on BlackBerries.

ANALYSIS

I. Time Spent Working

The FLSA unambiguously provides that employers are required to pay their employees wages for time spent working. The vital question for the employer whose employees may use BlackBerries outside of working hours is, whether that time spent on the BlackBerry is considered “time spent working” under the FLSA. This question is doubly important if the

7 In order to be covered under the FLSA, employees must be engaged in interstate commerce. See Tony and Susan Alamo Foundation v. Secretary of Labor, 471 U.S. 290, 295 (1985). This requirement may be satisfied by showing that the employees make interstate telephone calls or use the internet. See, e.g., DeMaria v. Ryan P. Relocator Co., 512 F. Supp. 2d 1249, 1256 (S.D. Fla. 2007).
employees work forty hour weeks because any “time spent working” beyond that would qualify for overtime.⁹

An obvious first step in our inquiry is to determine what “time spent working” means. The term “work” is not specifically defined by the Fair Labor Standards Act, although it defines “employ” as including, “to suffer or permit to work” for the employer.¹⁰ Conversely, an employee is “off duty” and not working at times when the “employee is completely relieved from duty and which are long enough to enable him to use the time effectively for his own purposes.”¹¹ An employee “is not completely relieved from duty and cannot use the time effectively for his own purposes unless he is definitely told in advance that he may leave the job and that he will not have to commence work until a definitely specified hour has arrived.”¹²

The broad definition of “hours worked” also includes time during which an employee is “necessarily required to be on the employer’s premises, on duty or at a prescribed work place.”¹³ Although the appeal of the BlackBerry is that it enables a hypothetical employee to work remotely, thus removing her from the employer’s premises or a prescribed work place, where such employee attends to work demands via BlackBerry, she is arguably “on duty” at that particular moment.

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¹⁰ 29 U.S.C. § 203(g) (2008); see also 29 C.F.R. § 785.6 (2008) (acknowledging that by statutory definition “the term employ includes (section 3(g)) ‘to suffer or permit to work.’”).
¹¹ 29 C.F.R. § 785.16 (2008).
¹² Id.
¹³ 29 C.F.R. § 785.7 (2008); see, e.g., Holzapfel v. Town of Newburgh, N.Y, 935 F. Supp. 418, 421-22 (S.D.N.Y. 1996) (noting that activity constitutes work and is compensable under the FLSA if it involves physical or mental exertion, whether burdensome or not, or the loss of employee’s time, that is controlled or required by employer and pursued necessarily and primarily for benefit of employer and his business).
The FLSA’s definition of “work” has been interpreted as including all hours that the employee is required to give her employer, including standby or waiting time.\textsuperscript{14} Examples of time worked beyond an employee’s regular shift has been found to include (1) certain travel time,\textsuperscript{15} (2) charitable work requested or controlled by the employer,\textsuperscript{16} and (3) on-call time where liberty is restricted.\textsuperscript{17} Where a hypothetical employee is expected to, and does, monitor work issues or respond to customers via BlackBerry, such efforts would be time the employee is required to give to her employer. Even where the employee, through her own industriousness—or compulsiveness—attends to work issues remotely after her regular shift, that time is most likely hours worked. Similarly, all voluntary work done during meal periods must be counted as compensable work time if the employer has reason to believe that work is being performed.\textsuperscript{18}

Moreover, the employee does not even need to be required by the employer to use her BlackBerry; she must merely do so for the employer’s benefit. Purely voluntary work performed outside of an employee’s shift is compensable time, where the work is performed with the knowledge or acquiescence of the employer.\textsuperscript{19} Such time worked is compensable, regardless of the reason for the work, as long as the employer “suffers or permits” the employee to work.\textsuperscript{20} While the hypothetical employer is sensible to implement rules prohibiting unauthorized overtime and otherwise prohibit employee work outside of regular business hours, the mere

\textsuperscript{14} 29 C.F.R. § 785.7 (2008); Armour & Co. v. Wantock, 323 U.S. 126, 133-34 (1944); Hill v. United States, 751 F.2d 810, 812 (6th Cir. 1984).
\textsuperscript{16} 29 C.F.R. § 785.41 (2008). See supra Section II.
\textsuperscript{17} 29 C.F.R. § 785.17 (2008).
\textsuperscript{18} 29 C.F.R. § 785.11 (2008); cf. Wirtz v. Healy, 227 F. Supp. 123, 130 (N.D. Ill. 1964). If the employer has no reason to know of the work, however, and the employee’s work during meal time was essentially de minimis, no compensation is required. Baker v. United States, 218 Ct. Cl. 602, 22 (Ct. Cl. 1978).
\textsuperscript{19} 29 C.F.R. § 785.11 (2008).
\textsuperscript{20} Id.
promulgation of a rule to that effect is not sufficient to avoid compensation for additional hours worked.  

Where the hypothetical employee initiates or responds to work issues remotely via BlackBerry, she is engaging in time worked on behalf of her employer. The employer will be obligated to compensate for this time, unless it can find a way to circumvent the FLSA’s requirements. One way may be to place employees on call.

II. On-Call

Extracurricular BlackBerry use may be analogized to “on-call” time. “On-call” time is the term used when employees are not actively working but are expected to be able to come into work or otherwise respond to a call on short notice. Being required to respond to an email or telephone call outside of working hours may be properly seen as placing the employee “on-call” in that the employee is not actively working unless he or she receives, sometimes literally, a call from a client or supervisor.

Employees are not compensated for on-call time unless that time is also designated as “working” time. Code of Federal Regulations section 785.17 states that “on-call time” is “working time” when the employee “who is required to remain on call on the employer's premises or so close thereto that he cannot use the time effectively for his own purposes.” In contrast, “[a]n employee who is not required to remain on the employer's premises but is merely required to leave word at his home or with company officials where he may be reached is not working while on call.”

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23 Id. The Code cites three quite old cases as support for its definitions: Armour & Co. v. Wantock, 323 U.S. 126, 128 (1944); Handler v. Thrasher, 191 F.2d 120, 122 (10th Cir. 1951); and Walling v. Bank of Waynesboro, Georgia, 61 F. Supp. 384, 386-87 (S.D. Ga. 1945).
It is the employee’s ability to use his or her time for his or her own purposes that is the primary focus of courts. When determining whether employees should be compensated for this on-call time, the two main factors courts consider are (1) the degree to which the employee is free to engage in personal activities; and (2) the agreements between the parties. Courts will typically hold that on-call time is spent working only if the employee’s free time is “severely” restricted. Employees are not required to have the same flexibility as if they were not on call. Instead, they must be so restricted for the employer’s benefit that they are effectively “engaged to wait.”

There are a number of specific factors courts typically consider in their analyses. Being required to stay on the employer’s premises, even if it is a nearby residence provided by the employer, weighs in favor of the employee. However, being required to remain in a nearby geographic area or within a certain traveling distance of the employer’s place of business does

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24 See, e.g., Adair v. Charter County of Wayne, 452 F.3d 482, 488 (6th Cir. 2006); Pabst v. Oklahoma Gas & Elec. Co., 228 F.3d 1128, 1134-35 (10th Cir. 2000); Dinges v. Sacred Heart St. Mary's Hospitals, Inc., 164 F.3d 1056, 1058 (7th Cir. 1999) (holding that, if time spent by employee “on call” can be devoted to the ordinary activities of private life, it is not “work” for purposes of FLSA). Cf. 29 C.F.R. 785.16 (2008) (holding that “off duty” time is when an employee is completely relieved from duty and for long enough to enable him to use the time effectively for his own purposes).
25 Brigham v. Eugene Water & Elec. Bd., 357 F.3d 931, 936 (9th Cir. 2004); Pabst, 228 F.3d at 1128.
27 See Aiken v. City of Memphis, Tennessee, 190 F.3d 753, 760 (6th Cir. 1999); Dinges, 164 F.3d at 1056; Ingram v. County of Bucks, 144 F.3d 265, 268 (3d Cir. 1998); Berry v. County of Sonoma, 30 F.3d 1174, 1182 (9th Cir. 1994).
28 See Andrews v. Town of Skiatook, Okl., 123 F.3d 1327, 1332 (10th Cir. 1997); Owens v. Local No. 169, Ass'n of Western Pulp and Paper Workers, 971 F.2d 347, 354 (9th Cir. 1992).
not. Similarly, instead of appearing restrictive, the use of pagers or cell phones also factors in the employer’s favor because those devices allow employees to be reachable while they are engaging in their own pursuits. Another aspect courts consider is the frequency and nature of calls to which the employees must respond. Employees who consistently receive calls during designated “on-call” times and who are required to respond to these calls within a short period of time are more likely to be considered “working” during their “on-call time.” Infrequent calls and flexibility in response weigh against compensation. The responsibility involved with responding to calls is also a factor courts consider. Of course, all of these factors must be balanced and courts will not consider one factor dispositive.

The typical “on-call case” appears to have little in common with the BlackBerry use of the hypothetical employee. The hypothetical employee is not required to email or make telephone calls within certain “shifts” but rather whenever the situation dictates. In a sense,

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30 Adair v. Charter County of Wayne, 452 F.3d 482, 488-89 (6th Cir. 2006); Huskey v. Trujillo, 302 F.3d 1307, 1311 (9th Cir. 2002); Reimer v. Champion Healthcare Corp., 258 F.3d 720, 725 (8th Cir. 2001); Birdwell v. City of Gadsden, Ala., 970 F.2d 802, 810 (11th Cir. 1992); Martin v. Ohio Turnpike Com’n, 968 F.2d 606, 612 (6th Cir. 1992) (travel not severely restricted); Bright v. Houston Northwest Medical Center Survivor, Inc., 934 F.2d 671, 677-78 (5th Cir. 1991); Allen v. United States, 1 Cl. Ct. 649, 651 (Cl. Ct. 1983).
31 See, e.g., Adair, 452 F.3d at 482; Brigham v. Eugene Water & Elec. Bd., 357 F.3d 931, 936 (9th Cir. 2004); Ingram, 144 F.3d at 265; Gilligan v. City of Emporia, Kan., 986 F.2d 410, 413 (10th Cir. 1993); Birdwell v. City of Gadsden, Ala., 970 F.2d 802, 809 (11th Cir. 1992); Allen, v. United States1 Cl. Ct. 649 (Cl. Ct. 1983). See also Armitage v. City of Emporia, Kan., 982 F.2d 430, 432-33 (10th Cir. 1992) (holding that an employee who is merely required to leave word at his home or with company officials where he may be reached is not working while on call).
32 See, e.g., Pabst, 228 F.3d at 1128; Renfro v. City of Emporia, Kan., 948 F.2d 1529, 1532 (10th Cir. 1991).
33 Dinges, 164 F.3d at 1056; Andrews, 123 F.3d at 1327; Gilligan, 986 F.2d at 410; Armitage v. City of Emporia, Kan., 982 F.2d 430, 432 (10th Cir. 1992).
34 Compare Adair v. Charter County of Wayne, 452 F.3d 482, 488 (6th Cir. 2006) (holding that firefighters not disciplined for failing to respond to pages were not “working”) with Brigham, 357 F.3d at 931 (holding that water and electric workers responsible for the safety of thousands and had to be “absolutely prepared” to respond to all calls at all times were “working”).
35 Berry, 30 F.3d at 1174.
these employees are always “on-call,” which has, at least in one case, *Pabst v. Oklahoma Gas & Elec. Co.*, weighed heavily in favor of the employee because it adds an extra burden to the employee’s ability to engage in his or her own pursuits.\(^{36}\) Moreover, *Pabst* held that in an “always on-call” situation, any amount of time the employee spent on his or her own pursuits was not subtractable from the “working on-call” time.\(^{37}\) Accordingly, once it was determined that the “on-call” time was spent predominantly for the employer’s benefit, the court was unwilling to do hour-by-hour analyses of who actually benefited.\(^{38}\) This is a concerning result for the hypothetical employer.

Part of this analysis may hinge on whether the employer requires the employees to use their BlackBerries outside of normal working hours. If the employee merely does it voluntarily and against company policy, courts may not impose the employee’s decision upon the employer.\(^{39}\) On the other hand, if the employer knows its employees are using their BlackBerries for work purposes after hours, the employer may not rely on the fact that it did not order its employees to do so.\(^{40}\) The crucial difference is likely to be the employer’s stated policy and how closely it adheres to this policy. The hypothetical employer may also be able to use one of the exceptions to the FLSA, which are discussed more fully below.

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\(^{36}\) *Pabst*, 228 F.3d at 1128.

\(^{37}\) *Id.*

\(^{38}\) *Id.*

\(^{39}\) *See Huskey*, 302 F.3d at 1307 (holding that the fact that a nurse at public hospital felt compelled to impose restrictions on her travel and activities beyond those necessitated by hospital's on-call policy did not entitle her to premium pay for on-call periods under Federal Employees Pay Act (FEPA); FEPA did not permit employee to trigger agency's duty to compensate by remaining at a work station voluntarily).

\(^{40}\) *Pabst*, 228 F.3d at 1128 (holding that a company is required to compensate employees because company knew that technicians were performing the duties they had been assigned, and knew of their on-call status).
III. Exceptions to the FLSA

A. *De Minimis*

Time that is otherwise compensable may be disregarded for compensation purposes where the time spent working is *de minimis*. Under the *de minimis* doctrine as articulated by the Supreme Court, work lasting only a few seconds or a few minutes beyond the scheduled working hours may be disregarded in a FLSA analysis. Similarly, the applicable FLSA statute explains that “insubstantial or insignificant periods of time beyond the scheduled working hours, which cannot as a practical administrative matter be precisely recorded for payroll purposes, may be disregarded.” An employer faced with an employee’s claim of overtime as a result of checking her BlackBerry beyond scheduled working hours will likely take the position that checking email, and even quickly reading and responding to an email, is *de minimis* and therefore not compensable.

Whether time spent attending to work demands remotely via BlackBerry is *de minimis* depends on the following factors: (1) the practical administrative difficulty of recording the additional time, (2) the aggregate amount of compensable time, and (3) the regularity of the additional work. For example, time spent by police department canine handlers in restraining, feeding, and cleaning up after dogs during their commutes to work was *de minimis* and would not be compensated under the FLSA. In reaching this conclusion, the court considered the administrative difficulty in establishing a reliable system for recording time spent by handlers caring for dogs during commutes, the irregularity of the occurrence of such care, and the tiny

44 Lindow v. United States, 738 F.2d 1057, 1063 (9th Cir. 1984).
amount of aggregate time so expended. Likewise, a case where an employee was required to return his employer’s telephone calls and answer “yes” or “no” was considered a minimal request that did not restrict the employee’s use of his personal time.

It should be noted that although the administrative difficulty in recording time is a factor to be considered in the de minimis test, it by no means absolved employers of their duty to record the time their employees spend working. Moreover, although there is no set definition of how much time is de minimis, the federal regulations and recent court cases seem to set the mark at ten minutes or less.

The often sporadic nature of responding to after-hours work issues, and the possible administrative difficulty of recording this additional time, may mean that the hypothetical employee’s BlackBerry use is de minimis. The three factors must be balanced, however. Thus, where an employee dedicates significant attention to work issues after regular working hours, and particularly where she does so on a regular basis, that time may be compensable and not de minimis despite the administrative inconvenience to the employer. However, the hypothetical employer may be able to rely on the Portal to Portal Act exception to the FLSA.

B. Portal to Portal Act

45 Reich v. New York City Transit Authority, 45 F.3d 646, 652 (2nd Cir. 1995).
48 See 29 C.F.R. § 785.47 (2008) (citing Hawkins v. E. I. du Pont de Nemours & Co., 12 W.H. Cases 448, 27 Labor Cases, para. 69094 (E.D. Va. 1955) (holding that 10 minutes a day is not de minimis); Reich v. Monfort, Inc., 144 F. 3d 1329, 1333 (10th Cir. 1998) (holding that 10 minutes spent regularly was not de minimis); Lindow, 738 F.2d at 1057 (noting that “[m]ost courts have found daily periods of approximately ten minutes de minimis even though otherwise compensable.”)).
49 See e.g., Brock v. City of Cincinnati, 236 F.3d 793, 805 (6th Cir. 2001) (reasoning that where “the gross amount of time spent and its regular recurrence likely outweigh the administrative difficulty factor, . . . we may fairly presume that the de minimis doctrine does not apply.”).
Under 29 United States Code Section 254, an employer is not liable to pay wages (overtime or otherwise) for “activities which are preliminary to or postliminary to said principal activity or activities” and “which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.” Unlike our prior inquiries, the primary question for the Portal to Portal Act is the kind of work done, not how much time is spent or her inconvenience in doing that work. The Portal to Portal Act will exclude BlackBerry use from the FLSA if it is a “preliminary or postliminary activity.” The Supreme Court has long held that any activity that is “integral and indispensable” to a “principal activity” is itself a “principal activity” under the Portal to Portal Act’s exception from FLSA requirements.

Two circuits have elaborated further on this definition. In the Second Circuit, “integral,” for purposes of the principle that activities that are integral and indispensable to principal activities are compensable under the FLSA, means, inter alia, “essential to completeness”, “organically joined or linked”, or “composed of constituent parts making a whole.” According to the Fifth Circuit, “[t]he test ... to determine which activities are ‘principal’ and which are ‘an integral and indispensable part’ of such activities, is ... whether they are performed as part of the regular work of the employees in the ordinary course of business.”

1. **Criteria are Flexible**

“Regular work in the ordinary course of business” does not mean that all work performed outside of working hours is not compensable. Decisions construing the Portal to Portal Act make

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52 Gorman v. Consolidated Edison Corp., 488 F.3d 586, 592 (2d Cir. 2007).
clear that an integral and indispensable activity may well take place before or after an employee's regular hours.\textsuperscript{54} Courts are also flexible on what types of work may be compensable. “[I]t is not only an employee's single predominant principal activity (and activities indispensable to it) which are compensable under the F.L.S.A., but rather all principal activities and any tasks incidental to them.”\textsuperscript{55} Moreover, the fact that employees do not expect compensation for the performed tasks at issue may not be relevant.\textsuperscript{56}

2. Necessary or Convenient?

In order to determine whether a task is principal, some courts consider the task’s necessity for the job and convenience to employee. If the task is necessary for the employee to do his normal work, that task is likely to be found compensable.\textsuperscript{57} If the task is required by the employer, it is likewise probably compensable.\textsuperscript{58} In other words, an activity will be considered a “principal activity” if the employee’s job could not be performed without it.\textsuperscript{59} The greater the disconnect between a task and the actual work an employee is hired to do, the more likely it will be considered not integral.\textsuperscript{60} Inconvenient or difficult tasks will also weigh in favor of ruling

\textsuperscript{54} See, e.g., Mitchell v. King Packing Co., 350 U.S. 260, 263 (1956) (holding that time spent by meat company butchers sharpening knives held an integral and indispensable part of principal activities); Barrentine v. Arkansas-Best Freight Sys., Inc., 750 F.2d 47, 50-51 (8th Cir. 1984) (holding that truck drivers’ time spent on pre-shift safety inspections held an integral and indispensable part of principal work activity).

\textsuperscript{55} Dunlop, 527 F.2d at 400.


\textsuperscript{57} D A & S Oil Well Servicing, Inc. v. Mitchell, 262 F.2d 552, 555 (10th Cir. 1958) (“[W]hat is important is that such work is necessary to the business and is performed by the employees, primarily for the benefit of the employer, in the ordinary course of that business.”); Dunlop, 527 F.2d at 401 (\textit{quoted by Karr}, 950 F.Supp. at 1322 ).


that the task is compensable. If an employee must spend a lot of time and concentration on an activity, it is more likely to be considered compensable time worked.

In contrast, activities that are infrequently done and do not take much time will likely fall under the Portal to Portal exception. This is true especially if the tasks are not required by the employer. Similarly, activities the employees perform for their own convenience or in their own interests will fall under the Portal to Portal exception, especially when those activities are not a required part of their job. If the task gives the employer a significant benefit, however, it may be found to be an “integral and indispensable” part of principal activities.

3. Fact-sensitive Test

As is to be expected, courts have held that this “indispensable and integral” test is heavily fact-sensitive and must be decided on a case by case basis. Courts have found the following

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61 Reich, 839 F. Supp. at 182.
62 Reich v. IBP, Inc., 38 F.3d 1123, 1126 (10th Cir. 1994) (holding that transportation of police dogs created problems for handlers when dogs became sick or unruly, prevented handlers from stopping for personal business).
63 Smith v. Aztec Well Servicing Co., 321 F. Supp. 2d 1234, 1238 (D.N.M. 2004). These activities are also more likely to be de minimis. See infra Section III(A).
66 Dunlop, 527 F.2d at 400. See also Reich v. New York City Transit Authority, 839 F. Supp. 171, 182 (holding that handler’s transportation of police dogs improved working relationship between handlers and dogs by reinforcing bonding between them, avoided centralized kenneling in city at transit authority's expense).
activities “intergral and indispensible”: cleaning, fueling and maintaining work vehicles,\textsuperscript{68} transportation of necessary equipment at the beginning or end of shifts,\textsuperscript{69} preparation of tools to be used at work,\textsuperscript{70} and donning safety gear.\textsuperscript{71}

In contrast, the following activities were held not indispensible or integral: time spent attending required classroom instruction conducted away from the jobsite after working hours,\textsuperscript{72} store stock cleanup and preparation,\textsuperscript{73} transporting employees or work materials from the worksite,\textsuperscript{74} and the maintenance of work vehicles used solely for commuting to and from work. These tasks were held to be too tangential to actual work duties to be “indispensable” or a “principal activity.”

4. Clerical Work Examples

At least two district courts have found that more clerical or white-collar tasks may not fall under the Portal to Portal exception and therefore can be compensable under the FLSA – \textit{LaPorte v. General Electric} and \textit{Dooley v. Liberty Mutual Insurance Company}.\textsuperscript{75} Both of these cases shed substantial light on the kinds of questions courts may ask about the hypothetical employee.

\textsuperscript{68} Treece, 923 F. Supp. at 1126; Barrentine, 750 F.2d at 47; Mitchell v. Mitchell Truck Line, Inc., 286 F.2d 721, 725 (5th Cir. 1961).
a. *LaPorte v. General Electric*

*LaPorte v. General Electric*, involved maintenance mechanics and instrument electricians who were required to be “on call” at all times and would be telephoned by a plant manager if the plant was having technical difficulties. If the electrician was required to go to the plant to repair the problem, he or she was paid for four hours, no matter how quickly the problem was resolved. However, mechanical problems were often resolved on the telephone, which usually required a series of calls that could last anywhere from five to twenty minutes with some time in between each call. The time that was at issue was when electricians or mechanics were required to wait between calls to see whether the problem was resolved. The court held that in order to determine whether these calls were preliminary or actual work, it had to examine the substance of the telephone calls. If the call was simply a request for the electrician or mechanic to report to work, that call was preliminary. However, if the electrician or mechanic used the calls to describe how to resolve a problem to the team lead, this was time spent working.

This analysis may easily be applied to the hypothetical employee. Emails or calls that tell the employee where to go for a meeting, for example, should be exempt under the Portal to Portal Act. However, much business, especially customer service business, is conducted over the phone and via email. If the hypothetical employee is reading essential work documents, responding to customer complaints, or discussing project strategy with co-workers on her

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76 *LaPorte*, 838 F. Supp. at 552.
77 *Id.* at 553.
78 *Id.*
79 *Id.*
80 This is echoed in *Burnette v. Northside Hosp.*, 342 F. Supp. 2d 1128, 1135–36 (N.D. Ga. 2004), where the time spent by an employee who was required to answer yes or no to telephone questions was considered to be *de minimis*.
BlackBerry, this time should not fall under the Portal to Portal exception under LaPorte’s reasoning.

b. **Dooley v. Liberty Mutual Insurance Company**

More recently, in *Dooley v. Liberty Mutual Insurance Company*, a Massachusetts District Court found that employees who engage in “principal activities” at home, such as checking email and voice mail, preparing their computers for use, and returning phone calls, before driving to their first off-site location, begin their work day at home.\(^{82}\) Essentially, the court found that “[t]heir office is their home” and ruled that their commuting time between their “home office” and first off-site job was compensable time.\(^{83}\) Consequently, our hypothetical employee’s BlackBerry use is found to be a principal activity and if the employee uses his or her BlackBerry before commuting to an off-site location for work, that commuting time may also be compensable.

This is similar to the Supreme Court’s holding in *IBP, Inc. v. Alvarez*.\(^{84}\) Under the “continuous workday rule,” any work that is done after the first principal activity and before the last principal activity may be compensable even if that other work is preliminary and not integral to the employee’s work.\(^{85}\) This may mean that if our hypothetical employee receives an email on her BlackBerry that can be considered integral to her work, any time she spends checking email afterwards, even if the rest of the email is work related but not integral, may be excluded under the Portal to Portal Act. However, if that work is of short duration, it may be excluded as *de minimis*.\(^{86}\)

\(^{82}\) *Dooley*, 307 F. Supp. 2d at 254.

\(^{83}\) *Id.*

\(^{84}\) 546 U.S. 21, 37 (2005).

\(^{85}\) *IBP, Inc.*, 546 U.S. at 37.

\(^{86}\) *See* Singh v. City of New York, 524 F.3d 361, 370 n.7 (2d Cir. 2008).
Likewise, if our employee receives an integral email and then commutes to work, that commuting time may arguably be compensable under the FLSA. However, recent cases have made this an unlikely outcome. Commuting time that takes place after an integral activity before working hours has been deliberately excluded by the Second Circuit and a Texas district court.\textsuperscript{87} This is probably a correct outcome because the “commuting” in \textit{IBP} was the short walk employees had to make to their workstations after putting on their protective gear which means they were already at their workplace and not actually commuting.\textsuperscript{88} It appears, therefore, that the continuous workday rule may not directly apply to the hypothetical employee who is checking her BlackBerry outside of her work premises.

\textbf{IV. Solutions}

Under relevant case law, the hypothetical employer has a problem. Once this employer knows or has reason to know that any employee is working outside of the office, it cannot deny compensation to that employee for that time even when the employee fails to claim overtime hours.\textsuperscript{89} This section attempts to identify solutions for limiting for the risk of claims of off-the-clock or uncompensated work resulting from extracurricular BlackBerry use.

\textbf{Impose and Enforce Restrictions}

In order to avoid these FLSA problems, employers can require employees to check emails or to perform work only during specified hours of each day, to carefully record and submit documentation of their time worked, and to ask and receive permission prior to working

\textsuperscript{88} IBP, Inc., 546 U.S. at 34.
\textsuperscript{89} 29 U.S.C.A. § 207(a) (2008); see also Holzapfel v. Town of Newburgh, N.Y., 145 F.3d 516, 524 (2d Cir. 1998).
in excess of 40 hours in a week. However, having a policy is not enough; employers must do what they can to make sure that policy is enforced.

**Train Supervisors to Recognize Time Worked and to Avoid Creating Extracurricular Work**

To the extent managers and supervisors are included in such email exchanges, they must be trained to recognize off-hour employee email traffic and reconcile it with the time reported by the employee. It would also behoove employers to train their supervisors to not only ensure that employees do not use their BlackBerries for work purposes outside of business hours but to make sure that their supervisors are not giving work outside of business hours. Supervisors should email or leave messages for their subordinates with regard to giving assignments or sending messages that require a response from the employee before the end of the workday so that employees may receive these messages during normal working hours. Messages that merely inform employees of meetings or even company policies are unlikely to be considered “principal activities” so they may be sent at any time.

**Implement Policy for Handling After-Hours Client Demands**

As for emails or cellular phone calls from customers or clients, employers will have to talk to the employees directly and either instruct them to not take these calls after hours (which may be detrimental to the employer’s business), to take the calls but inform the client or customer that they will work on the issue during business hours (these short phone calls are more likely to be considered *de minimis*), or to carefully record their time so that they may be compensated for these calls and whatever work they do to conclude them.

**Consider Employing An Agreement Regarding BlackBerry Use**

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90 Donald W. Benson & Gina M. Cook, *Don’t Just Wing It*, 44 TENN. B.J. 12, 18 (February, 2008).
It is likely that courts will look favorably on agreements reached between employers and employees for time spent on BlackBerries outside of work. Such agreements are permissible in situations where employees reside on their employers’ premises or work from home and it is “difficult to determine the exact hours worked under these circumstances.”92 In these situations, “any reasonable agreement of the parties which takes into consideration all of the pertinent facts will be accepted” by courts.93 Accordingly, an employee policy or agreement seems to be the sensible solution, especially if the employer monitors its employees to make sure that the agreement is fair and roughly captures the time spent on BlackBerries outside of the office.

CONCLUSION

The technology that makes working easier can also make it more difficult to determine who is working and when for FLSA purposes. Employers have every right to encourage their employees to be accessible to their clients and to their supervisors outside of work hours. Doing so surely improves efficiency and work output and may even make the job easier for employees who can complete their tasks in the comfort of their own homes or do necessary preparatory work via email while in their pajamas. It seems likely that this trend of blurring the lines between work and home will only increase as technology improves and becomes less expensive. The danger is that employers still have the onus to discover and record when their employees are doing work that benefits the employer.

As such, it is now necessary for employers to work harder and think about how their technology is affecting their employees’ work hours and how they will avoid a violation of the

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92 29 C.F.R. § 785.23 (2008).
93 Id.
FLSA. FLSA exceptions such as the Portal to Portal Act or the *de minimis* exception may provide refuge for employers but only if they follow those exceptions’ rigorous standards. The most practical solution is for employers to ascertain how and when their employees are using their BlackBerries and then decide how they will compensate for this time or else restrict the use of these devices (and enforce these restrictions) so that these employers can be sure that they have done all that is required under the FLSA. The alternative is costly and avoidable litigation.