

## Controlling Smart-Phone Abuse: The Fair Labor Standards Act's Definition of "Work" in Non-exempt Employee Claims for Overtime\*

### I. INTRODUCTION

Analysts expect more than 35 million smart phones will be sold in the United States in 2008, which represents an increase of seventy-seven percent from 2007.<sup>1</sup> Smart phones, such as the BlackBerry and iPhone, allow people to use the Internet, send and receive e-mail, and store data.<sup>2</sup> These features allow people to be in constant and instant communication with their family, friends, and, particularly, the office. The increasing prevalence of smart phones has repercussions for both employees and their employers as the separation between work and home becomes ever smaller. Employees are now able to accomplish substantive work in the office, in the home, on the way to and from work, and just about any place else using the smart phone's capabilities. The smart-phone culture can infect the workplace, and both senior and junior employees may feel compelled to do work once they have left the office.<sup>3</sup> As a result, employers are potentially liable for overtime compensation when non-exempt employees use their smart phones to perform work-related tasks when they are off the clock. The "non-exempt" label refers to employees who do not fall under the maximum hour exemptions of the Fair Labor Standards Act (FLSA).<sup>4</sup>

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1. Roger Cheng, *Smart Phones Challenge Firms*, WALL ST. J., Sept. 3, 2008, at B10.

2. Roger Cheng, *Personal Smartphones Pull Double Duty at Work—Use Saves Firms Money, But They Must Deal With Security Issues*, WALL ST. J., May 13, 2008, at B7.

3. See *Management Report—BlackBerry Addiction Starts at the Top*, CIO MAG., Mar. 1, 2007, available at [http://www.cio.com/article/29081/Management\\_Report\\_Addiction\\_Starts\\_at\\_the\\_Top](http://www.cio.com/article/29081/Management_Report_Addiction_Starts_at_the_Top) (stating ninety percent of workers feel compulsion to use their smart phone).

4. See 29 U.S.C. § 213(a)(1) (2008) (stating that the maximum hour requirements of 29 U.S.C. § 206 do not apply to "any employee employed in a bona fide executive, administrative, or professional capacity . . . or in the capacity of outside salesman").

There are currently no lawsuits alleging violations of the FLSA's overtime provisions with respect to the use of smart phones outside of work, but experts believe it is only a matter of time before a claim is filed.<sup>5</sup> Companies have begun to institute new policies and procedures attempting to preempt any potential issues with employees.<sup>6</sup> The best policy would be to never give smart phones to non-exempt employees, but this is not always feasible.<sup>7</sup> Employees may purchase their own smart phone and use it to increase their productivity.<sup>8</sup> As a result, smart phone-related policies can only partially insulate companies from liability because employees may be working unrequested overtime that is compensable if the employer has knowledge of the work.<sup>9</sup>

In 2007, the U.S. Department of Labor collected \$163 million in back wages for overtime violations.<sup>10</sup> Companies also face fines for violations of the FLSA, which totaled \$3.9 million in 2007.<sup>11</sup> Given the continued growth of the smart-phone market, companies face the potential for huge verdicts or settlements and protracted litigation over wage-and-hour claims for smart-phone use. In fact, under 29 U.S.C. § 216(b), successful FLSA claimants can “recover unpaid regular and overtime wages, an additional amount of liquidated damages equaling the amount of the wages recovered, legal or equitable relief, costs, and mandatory attorneys’ fees.”<sup>12</sup> Without settled policies and procedures defining how to calculate overtime when using a smart phone, employers are exposing themselves to unexpected liabilities. Courts have yet to develop any precedent regarding the fair and proper method to calculate compensable time for smart-phone use. This creates a situation that is unfair to both the employer and employee. Employees could potentially claim overtime each time they check their e-mail while at home.

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5. Joseph Pisani, *Workplace BlackBerry Use May Spur Lawsuits*, CNBC.COM, July 9, 2008, <http://www.cnbc.com/id/25586129> (“I’ll bet anything that a lawsuit is going [to] happen,” says Robert Brady, founder and CEO of Business & Legal Reports, a company that works with human resource professionals to comply with the law.”).

6. *Id.*

7. *Id.*

8. See Cheng, *supra* note 2 (stating that “[a]bout 80% of workplace smartphones used at small businesses were purchased by employees”).

9. See MARK A. ROTHSTEIN ET AL., *EMPLOYMENT LAW* 337–51 (3d ed. 2005) (“Work not required or requested by the employer counts as hours worked if the employer has actual or constructive knowledge of it.”).

10. *How to Audit Your Payroll Department for DOL Compliance*, 2008 PAYROLL MANAGER’S REP. 1 [hereinafter *DOL Compliance*].

11. *Id.*

12. Scott Edward Cole & Matthew R. Bainer, *To Certify or Not To Certify: A Circuit-By-Circuit Primer on the Varying Standards for Class Certification in Actions Under the Federal Labor Standards Act*, 13 B.U. PUB. INT. L.J. 167, 168 (2004).

Employees can easily take advantage of poor policies, and companies will feel the financial repercussions. For example, a woman in Chicago was able to record 800 hours of overtime in seventeen weeks, which entitled her to a \$32,000 payout.<sup>13</sup> Alternatively, employers could refuse to compensate employees for smart-phone use because the employer believes the work is not compensable.

This Comment examines the plain meaning of the elements in the FLSA that apply to compensating non-exempt employees for overtime. It also examines judicial interpretations of the FLSA and congressional amendments to the FLSA, both of which affect the FLSA's scope and application. This Comment argues that the United States Supreme Court has established a broad definition of "work," under which non-exempt employee smart-phone use could certainly qualify. Under the Supreme Court's interpretation, there is a strong potential that employers will be liable for smart-phone overtime claims. This Comment discusses the judicial interpretations and congressional amendments to provide an analytical framework for examining the legitimacy of potential wage-and-hour claims. Additionally, this Comment examines how the framework can be used to control employer liability in frivolous and unreasonable smart-phone overtime claims and ultimately provides advice on policies and procedures that may limit employer liability.

Section II of this Comment will give a detailed overview and background of the FLSA and the policies behind its enactment. The section will provide specific insight on how the Supreme Court interprets the meaning of "work" within the FLSA. Additionally, it will note how the courts and Congress have attempted to balance the FLSA's broad aim of protecting workers against the practical realities of industry with an eye toward protecting employers from unforeseen liability. The three limitations analyzed will be the *de minimis* doctrine, the Portal-to-Portal Act of 1947,<sup>14</sup> and the case law regarding on-call duty. Section II will also look at the consequences employers face for violating the FLSA, including the Act's mandated penalties as well as the payment to employees for uncompensated overtime work. Finally, the current status of legal issues regarding potential smart-phone claims will be discussed.

Section III of this Comment will provide an analysis of an employee's smart-phone use in the context of the FLSA and judicial rulings. First, the section will attempt to determine whether or not smart-

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13. Lisa Belkin, *O.T. Isn't as Simple as Telling Time*, N.Y. TIMES, Sept. 20, 2007, at G2.

14. Portal-to-Portal Act of 1947, 29 U.S.C. §§ 251–262 (2006); see Marc Linder, *Class Struggle at the Door: The Origins of the Portal-to-Portal Act of 1947*, 39 BUFF. L. REV. 53, 55 (1991).

phone use constitutes work under the FLSA's definition of overtime and under the Supreme Court's ruling in *Tennessee Coal, Iron & Railroad v. Muscoda Local No. 123*.<sup>15</sup> Second, the section will use judicial and congressional limitations to analyze smart-phone use. Particularly, the analysis will look at the strengths and weaknesses of the three exceptions as applied to potential smart-phone claims. The section will attempt to develop a framework which courts can use to examine smart-phone claims. Finally, the section will provide employers with potential solutions for limiting and controlling the non-exempt employee's use of a smart phone while off-duty.

## II. BACKGROUND

In evaluating wage-and-hour claims, it is important to understand the statutes that state the law and the cases that interpret the appropriate application. The FLSA is the primary statute used in overtime claims.<sup>16</sup> The Supreme Court and courts across the country have interpreted the Act and applied it to many different fact patterns.<sup>17</sup> This section provides both the statutory and common-law background for wage-and-hour claims.

### A. Overview of the FLSA

The FLSA was enacted to establish a uniform system of law that guaranteed compensation for work done to all employees covered under the Act.<sup>18</sup> In the declaration of policy, Congress recognized that "the existence . . . of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers" was negatively affecting commerce.<sup>19</sup> Two of the most notable provisions of the FLSA are the minimum-wage requirement and the establishment of overtime.<sup>20</sup> Prior to the enactment of the FLSA, companies often used collective bargaining agreements and custom to establish the standard for compensation, but the FLSA set a

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15. 321 U.S. 590, 598 (1944), *superseded by statute*, Portal-to-Portal Act of 1947, ch. 52, 61 Stat. 84 (1947) (codified at 29 U.S.C. §§ 251–262).

16. See discussion *infra* Part II.B.

17. See discussion *infra* Parts II.B.1, II.C.1, II.C.3.

18. *Tenn. Coal, Iron & R.R.*, 321 U.S. at 602.

19. 29 U.S.C. § 202(a).

20. See *id.* §§ 206–207.

standardized guide for employers to follow.<sup>21</sup> The Great Depression was the primary motivator behind the FLSA, and the minimum-wage and overtime provisions were designed to provide incentives for employers to offer more jobs while making sure workers were not abused.<sup>22</sup> Following its policy declaration, Congress established broad definitions and laws designed to protect workers “without substantially curtailing employment or earning power.”<sup>23</sup>

### *B. FLSA Requirements for Overtime*

The overtime provisions of the FLSA are set forth in 29 U.S.C. § 207(a).<sup>24</sup> Section 207 is entitled “Maximum Hours” and sets forth the applicable guideline:

Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.<sup>25</sup>

Within this provision there are several terms which are defined in the FLSA,<sup>26</sup> but those terms that are not defined have been subject to considerable debate and litigation.<sup>27</sup> An employer is defined as “any person acting directly or indirectly in the interest of an employer in relation to an employee . . . .”<sup>28</sup> The definition of employer is interpreted very broadly in order to “carry out the declared purpose of the Act.”<sup>29</sup> An employee is defined as an “individual employed by an employer,”<sup>30</sup>

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21. See *Tenn. Coal, Iron & R.R.*, 321 U.S. at 600–02 (noting that the FLSA makes any prior custom or contract immaterial if the customary compensation standards fall below those set forth in the Act).

22. David Phelps, *Surge in Wage Suits has Courts on Overtime*, STAR TRIB. (Minneapolis, Minn.), Oct. 7, 2007, at 1D.

23. 29 U.S.C. § 202(b).

24. *Id.* § 207(a).

25. *Id.* § 207(a)(1).

26. *Id.* § 203.

27. See, e.g., *Brock v. City of Cincinnati*, 236 F.3d 793, 800–01 (6th Cir. 2001) (analyzing compensable “work” under the FLSA).

28. 29 U.S.C. § 203(d).

29. *Walling v. Atl. Greyhound Corp.*, 61 F. Supp. 992, 993 (E.D.S.C. 1945) (noting the “term ‘employer’ is not limited to the narrow conception of principal and agent, or master and servant”).

30. 29 U.S.C. § 203(e)(1).

and employ means “to suffer or permit to work.”<sup>31</sup> The courts limited the broadness of these definitions by declaring that the purpose of the FLSA is to apply fixed standards for existing wage liabilities but not to create new wage liabilities.<sup>32</sup>

The FLSA also exempts certain workers from the maximum-hour requirements.<sup>33</sup> Specifically, the FLSA states that employees working in executive, administrative, professional, or outside sales positions will be excluded from the maximum-hours requirement of 29 U.S.C. § 207.<sup>34</sup> These terms are “defined and delimited” by the Department of Labor (DOL).<sup>35</sup> In 2004, the DOL added another qualification to the exemption requiring that employees be paid a salary basis of at least \$455 per week in addition to the job capacity requirements.<sup>36</sup> Employers do not have to meet the FLSA minimum-wage and maximum-hour requirements for employees who fall under the exemptions. The Supreme Court, emphasizing the purpose of the FLSA, has stated that the exemptions should be narrowly construed in order to give plain meaning to the statute and the intent of Congress.<sup>37</sup> Thus the burden is on the employer to prove a particular employee falls within a certain exemption.<sup>38</sup> Any investigation of exempt status involves an in-depth look at the facts as they apply to the employment standards set forth by the DOL.<sup>39</sup>

#### 1. What Constitutes Work Under the FLSA?

In order to determine how much overtime an employee is entitled to, the court must determine what constitutes compensable work. The FLSA provides no specific definition of work.<sup>40</sup> In addressing this basic question, the Supreme Court determined work should be understood as it is commonly used.<sup>41</sup> In *Tennessee Coal*, the Supreme Court stated that work meant “physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and

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31. *Id.* § 203(g).

32. *E.g.*, *Bowman v. Pace Co.*, 119 F.2d 858, 860 (5th Cir. 1941).

33. 29 U.S.C. § 213.

34. *Id.* § 213(a)(1).

35. *Id.*

36. 29 C.F.R. § 541.600(a) (2005).

37. *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945).

38. *Idaho Sheet Metal Works, Inc. v. Wirtz*, 383 U.S. 190, 209 (1966).

39. *Cooke v. Gen. Dynamics Corp.*, 993 F. Supp. 56, 60 (D. Conn. 1997).

40. *See ROTHSTEIN ET AL.*, *supra* note 9, at 337 (stating the FLSA “does not contain any general definition of ‘work’ or of compensable time”).

41. *Tenn. Coal, Iron & R.R. v. Muscoda Local No. 123*, 321 U.S. 590, 598 (1944).

primarily for the benefit of the employer and his business.”<sup>42</sup> The Supreme Court took this definition primarily from the unabridged second edition of Webster’s New International Dictionary.<sup>43</sup> In *Steiner v. Mitchell*, the Court expanded the definition to include compensation for work that was performed while the employee was off-duty as long as the work was “an integral and indispensable part of the [employee’s] principal activities.”<sup>44</sup>

Additionally, compensation cannot be denied only because the employee could have accomplished and finished the work during the scheduled time.<sup>45</sup> In *Brock v. City of Cincinnati*, the court looked at three issues to determine the nature of the work: (1) Did the employer “require or suffer” the employees to perform the duties? (2) How much of the off-duty work was performed “necessarily and primarily for the benefit” of the employer? and (3) Was the off-duty work an “integral and indispensable part of the principal activities” for which the employee was hired?<sup>46</sup> Ultimately, courts will look at the totality of circumstances to determine if the work the employee performed was compensable.<sup>47</sup> Using the totality of circumstances and the general definition of work, the courts have found the FLSA covers such work activities “as watching and guarding a building, waiting for work, and standing by on call.”<sup>48</sup>

C. *Ways in Which Congress and the Judicial System Sought to Limit the Supreme Court’s Broad Interpretation of “Work”*

The definition of “work” set forth in *Tennessee Coal* was broad to the point that new liabilities would be created.<sup>49</sup> It was not beneficial to either the courts or employers to have such a broad definition. The courts would be clogged with frivolous claims, and the employers would face increased legal fees having to defend claims from any employee who felt he or she was not fairly compensated. The courts developed the de minimis doctrine to meet the practical administrative concerns of

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42. *Id.*

43. *Id.* at 598 n.11.

44. 350 U.S. 247, 256 (1956).

45. *Holzapfel v. Town of Newburgh, NY*, 145 F.3d 516, 522 (2d Cir. 1998).

46. 236 F.3d 793, 801 (6th Cir. 2001).

47. *Holzapfel*, 145 F.3d at 524; see also ROTHSTEIN ET AL., *supra* note 9, at 337–41 (stating that determining compensability for physical or mental exertion requires looking at a variety of factors and resolution of the issue depends on the facts of the case).

48. *Tenn. Coal, Iron & R.R.*, 321 U.S. at 599 (citations omitted).

49. See generally *Steiner*, 350 U.S. at 254 (noting that “the Senate intended the activities of changing clothes and showering to be . . . [considered “work”] if they are an integral part of and are essential to the principal activities of the employees”).

compensating an employee for only a few seconds or minutes of work.<sup>50</sup> Congress enacted the Portal-to-Portal Act to limit compensable work done before and after work to only those activities which are integral and indispensable to the employee's principal activity.<sup>51</sup> Furthermore, the courts have heard several cases addressing the circumstances and factors in which on-call duty may be compensable.

### 1. The De Minimis Doctrine

Concerned with the possibility of producing new liabilities with the broad definition of work, the Supreme Court recognized the potential application of a de minimis doctrine.<sup>52</sup> The doctrine was aimed at allowing courts to treat negligible amounts of work as non-compensable even though they were theoretically compensable under the FLSA.<sup>53</sup> The doctrine is primarily concerned with taking a practical approach to the administrative difficulties of recording small amounts of time.<sup>54</sup> The Court recognized that the FLSA's definition of work must be computed "in light of the realities of the industrial world."<sup>55</sup> Particular focus was put on the work being substantial as opposed to an employee claiming overtime for a "few seconds or minutes of work beyond the scheduled working hours."<sup>56</sup> In fact, the Supreme Court stated that the FLSA does not preclude the use of reasonable provisions of contract or custom to keep track of compensable time when there is no particularly accurate system in place.<sup>57</sup> Thus, the courts did not establish a bright-line rule but rather relied on looking at the facts in light of "common sense."<sup>58</sup>

The *Lindow v. United States* court laid out three considerations when making de minimis determinations: "(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."<sup>59</sup> The practical administrative consideration takes into account the "realities of

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50. See 29 C.F.R. § 785.47 ("In recording work time under the Act, 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. The courts have held that such trifles are de minimis.")

51. *Steiner*, 350 U.S. at 256.

52. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 692 (1946).

53. *Brock v. City of Cincinnati*, 236 F.3d 793, 804 (6th Cir. 2001).

54. *Lindow v. United States*, 738 F.2d 1057, 1062 (9th Cir. 1984).

55. *Id.* at 1063 (quoting *Anderson*, 328 U.S. at 692).

56. *Id.* at 1062 (quoting *Anderson*, 328 U.S. at 692).

57. *Brock*, 236 F.3d at 801.

58. *Lindow*, 738 F.2d at 1062.

59. *Id.* at 1063.

the industrial world.”<sup>60</sup> Courts have found that claims that may be de minimis on a daily basis can be aggregated into a “substantial claim” and thus eligible for compensation under the FLSA.<sup>61</sup> The court reasoned that it would be unfair to compensate a worker \$50 for a week’s work but deny the same compensation to another worker who earned \$1 a week for fifty weeks.<sup>62</sup> Finally, when looking at the regularity of the additional work, courts have found sporadic work and isolated instances are not enough to defeat the de minimis doctrine.<sup>63</sup> Despite the absence of a bright-line rule, most courts have found that in most cases anything less than ten minutes is de minimis.<sup>64</sup> The de minimis doctrine has been fundamental in declaring preliminary work activities as falling outside of the scope of the FLSA.<sup>65</sup>

## 2. 1947 Portal-to-Portal Act Amendment

In response to case law which increased the exposure of companies to unexpected liabilities, Congress amended the FLSA in 1947 to include the Portal-to-Portal Act.<sup>66</sup> The Portal-to-Portal Act specifically made the following activities noncompensable:

- (1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and
- (2) activities which are preliminary to or postliminary to said principal activity or activities, which occur 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.<sup>67</sup>

In *Steiner v. Mitchell*, the Court found employees’ time spent showering and changing clothes after working with hazardous materials was an integral and indispensable part of the job and included in the principal activities.<sup>68</sup> Thus the employee’s preliminary and postliminary work was

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60. *Id.* (quoting *Anderson*, 328 U.S. at 692).

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* at 1062.

65. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 693 (1946).

66. *Bobo v. United States*, 37 Fed. Cl. 690, 692 (1997).

67. *Id.* (citing 29 U.S.C. § 254(a) (1994)).

68. *Steiner v. Mitchell*, 350 U.S. 247, 251–53 (1956).

excluded from the provisions of the Portal-to-Portal Act.<sup>69</sup> The Supreme Court held that “activities performed either before or after the regular work shift, on or off the production line, are compensable” even with the Portal-to-Portal Act’s revisions to the FLSA.<sup>70</sup> The Court reviewed the legislative history and the language of the statute and reasoned that Congress did not intend the Portal-to-Portal Act to deprive workers of FLSA benefits for work that is an *integral and indispensable* part of their principal activity.<sup>71</sup>

### 3. Judicial Understanding of What Constitutes On-Call Time

Another restriction on the FLSA’s broad definition of work applies to employees who are deemed to be on call. Stemming from the *Armour & Co. v. Wantock*<sup>72</sup> and *Skidmore v. Swift & Co.*<sup>73</sup> cases in which the Supreme Court declared that waiting time may be compensable depending on the circumstances,<sup>74</sup> courts have faced issues over whether or not on-call time is considered compensable under the FLSA.<sup>75</sup> As with most overtime claims, on-call inquiries are “highly individualized and fact-based”<sup>76</sup> and need to be addressed with an emphasis on practicality.<sup>77</sup>

The DOL has set forth regulations concerning on-call compensation in 29 C.F.R. section 553.221(d).<sup>78</sup> The regulations state that “[t]ime spent at home on call may or may not be compensable depending on whether the restrictions placed on the employee preclude using the time for personal pursuits.”<sup>79</sup> The regulations further state that “where the conditions placed on the employee’s activities are so restrictive that the employee cannot use the time effectively for personal pursuits, such time spent on call is compensable.”<sup>80</sup> Allowable restrictions often include not being able to drink alcohol or take mind-altering drugs.<sup>81</sup> It is also

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69. *Id.* at 256.

70. *Id.*

71. *Id.* at 254–56.

72. 323 U.S. 126 (1944).

73. 323 U.S. 134 (1944).

74. *Armour & Co.*, 323 U.S. at 133; *Skidmore*, 323 U.S. at 136.

75. *Adair v. Charter County of Wayne*, 452 F.3d 482, 486–87 (6th Cir. 2006).

76. *Pabst v. Okla. Gas & Elec. Co.*, 228 F.3d 1128, 1132 (10th Cir. 2000).

77. *Reimer v. Champion Healthcare Corp.*, 258 F.3d 720, 725 (8th Cir. 2001).

78. *Adair*, 452 F.3d at 487.

79. 29 C.F.R. § 553.221(d) (2009).

80. *Id.*

81. *Reimer*, 258 F.3d at 725.

tolerable to have a defined method of keeping in contact with the employee whether it is a pager, cell phone, or the employees telling their employer where they can be contacted during their on-call duty.<sup>82</sup>

Section 785.17 also addresses the on-call issue by stating that an employee “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 is working while ‘on call.’”<sup>83</sup> On the contrary, an employee that “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.”<sup>84</sup> *Dinges v. Sacred Heart St. Mary’s Hospitals, Inc.*, stated that it is important to look at how the on-call arrangement affected an employee’s ability to effectively use his time.<sup>85</sup> An employee who is at home during his on-call duty but called away every other hour will not be able to effectively use his time.<sup>86</sup> However, as in *Dinges*, if there exists less than a fifty percent chance of being called during a fourteen to sixteen hour on-call period, then time may be used effectively.<sup>87</sup> Additional factors for the courts to consider include excessive geographical restrictions, the ability to trade the on-call responsibilities, and the ability to ease restrictions.<sup>88</sup> It is important to note that any of the factors by themselves are not conclusive.<sup>89</sup>

Circuit courts remain split on workers who always keep employees on call. The Fifth Circuit stated that it is extremely burdensome to always be on call, but that does not necessarily make the on-call time compensable.<sup>90</sup> However, the Eighth Circuit has held that making employees monitor and respond all day, every day weighs heavily toward being compensable under the FLSA.<sup>91</sup> The Tenth Circuit also takes the always-being-on-call burden as relevant to the inquiry but certainly not dispositive.<sup>92</sup> In on-call FLSA cases, courts will typically review de novo the particular set of facts and look for the most factually

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82. See *Dinges v. Sacred Heart St. Mary’s Hosps., Inc.*, 164 F.3d 1056, 1057–59 (7th Cir. 1999) (deciding that emergency medical technicians’ time spent on call is not compensable although they must be in position for hospital to contact them).

83. 29 C.F.R. § 785.17.

84. *Id.*

85. *Dinges*, 164 F.3d at 1058.

86. *Id.*

87. *Id.*

88. Perkins Coie, *Potential Overtime Issues in an Increasingly Technological Society*, 14 OR. EMP. L. LETTER, Aug. 2008, at 5.

89. *Id.*

90. *Bright v. Houston Nw. Med. Ctr., Inc.*, 934 F.2d 671, 678–79 (5th Cir. 1991).

91. *Cross v. Ark. Forestry Comm’n*, 938 F.2d 912, 916–17 (8th Cir. 1991).

92. *Pabst v. Okla. Gas & Elec. Co.*, 228 F.3d 1128, 1134–35 (10th Cir. 2000).

analogous cases.<sup>93</sup> This necessarily means each claim has the potential for endless litigation at great expense to the company.

*D. Penalties and Consequences of FLSA Violations*

In addition to the large settlements and verdicts facing employers who violate the overtime compensation provisions of the FLSA, employers can also face fines and imprisonment.<sup>94</sup> Section 216 sets out a maximum fine of \$10,000 and imprisonment up to six months (although prison sentences are reserved for repeat offenders).<sup>95</sup> But the bigger penalty faced is that the FLSA states any employer who violates the provisions of 29 U.S.C. § 207 will be liable for the unpaid wages of the employee or employees affected.<sup>96</sup> As such, employers paid \$163 million in 2007.<sup>97</sup>

*E. Current Smart-Phone Legal Issues*

There are presently no cases in the U.S. courts litigating a non-exempt employee's FLSA wage-and-hour claim based on the employee's use of his smart phone outside of his regular work hours.<sup>98</sup> Many companies, on the advice of attorneys and consultants, have drawn up policies and procedures to preempt any attempt by an employee to claim overtime for simply checking his e-mail.<sup>99</sup> But even the best laid policies can only prevent so much, especially when office culture is increasingly smart-phone oriented and employees are feeling pressure from their peers and superiors to stay in contact around the clock.<sup>100</sup>

Employers should be particularly concerned about the lenient standard for FLSA class-action certification.<sup>101</sup> The process for FLSA class certification requires the plaintiff to prove "that an adequate number of class members will ultimately opt into the action, and that these class members are likely to satisfy the 'similarly situated' standard of the relevant Federal tribunal."<sup>102</sup> The burden on the plaintiff is

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93. *Id.* at 1134.

94. 29 U.S.C. § 216(a) (2006).

95. *Id.*

96. *Id.* § 216(b).

97. *DOL Compliance*, *supra* note 10, at 1.

98. *See* Pisani, *supra* note 5 (stating that "experts . . . are not aware of any current lawsuits").

99. *Id.*

100. *Management Report*, *supra* note 3.

101. Cole & Bainer, *supra* note 12, at 169–70.

102. *Id.*

relatively “de minimis,” and the federal courts usually permit the issuance of notice upon the representative plaintiffs’ declaration of the action.<sup>103</sup> Such a “de minimis” burden “tends to produce an even more robust-sized class.”<sup>104</sup> The threat of a large class action wage-and-hour claim should provide an ample incentive for employers to reevaluate their policies and procedures for smart-phone use and overtime compensation.

The drafters of the FLSA in 1938 certainly did not envision having to deal with the technology issues of today, but smart-phone claims will probably follow the same line of fact-intensive inquiry. Until there are some cases addressing the issue, a careful analysis of potential smart-phone claims must be done to determine where the claims may fit in terms of FLSA’s understanding of “work” and the limitations on the definition.

### III. ANALYSIS

The Supreme Court and the FLSA have developed definitions of “work,” and it is important to first address how smart-phone use fits into this definition. This section will first determine whether the use of a smart phone constitutes work under the FLSA. All inquiries into overtime compensation must begin by analyzing whether or not the work qualifies as compensable. It is only after determining if the work is compensable that the judicial and congressional limitations can be applied. This section only contemplates non-exempt employee smart-phone use because, under the FLSA, non-exempt employees are the only employees eligible to receive overtime compensation.

#### *A. Does the Use of a Smart Phone Facially Constitute Work Under the FLSA?*

Determining the legitimacy of an overtime claim under the FLSA will depend on whether the employee’s use of a smart phone fits into the Act’s broad definition of “work.” The FLSA does not explicitly define “work,” but the Supreme Court has broadly defined it as “physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the

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103. *Id.* at 170.

104. *Id.*

employer and his business.”<sup>105</sup> Taking the definition element by element, the use of a smart phone probably fits into the definition.

1. Whether Smart-Phone Use Constitutes “Physical or Mental” Exertion

First, the use of a smart phone consists of “physical or mental exertion” to some extent. The main tool of a smart phone is the ability to send and receive e-mail, and writing an e-mail for work requires some sort of mental exertion. Additionally, smart phones are now becoming advanced to the point that documents such as contracts, presentations, and articles can be viewed using such phones.<sup>106</sup> These activities would fit into “mental exertion” if the documents needed to be approved or edited before being sent to clients. Furthermore, the definition is qualified by the fact that the exertion does not need to be burdensome.<sup>107</sup> This additional qualification makes the already liberal compensable-time test even more so.<sup>108</sup> Under the test, responding to e-mail, answering work calls, doing Internet research, or any other employment activity performed using the smart phone fit into the FLSA’s definition of “work” because the employee is producing for the employer.<sup>109</sup> The no-burden qualification could even make typing, scrolling, and dialing on the phone a compensable physical exertion.

2. Determining Whether the Employer Controls or Requires the Employee’s Use of a Smart Phone Outside the Office

The second part, “controlled or required by the employer,” involves a look at the policies and procedures of the company. An employer cannot deny compensation to an employee if the employer “knows or has reason to know that an employee is working overtime . . . even where the employee fails to claim overtime hours.”<sup>110</sup> Constructive knowledge is

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105. *Tenn. Coal, Iron & R.R. v. Muscoda Local No. 123*, 321 U.S. 590, 598 (1944).

106. *Apple Introduces the iPhone 3G*, MACWORLD, Aug. 1, 2008, at 20 (“During his keynote, [Steve] Jobs said that the new software will have a search feature for contacts, full support for iWork documents, the ability to view PowerPoint presentations, and a scientific calculator that appears when you launch the Calculator application and rotate the iPhone into landscape mode.”).

107. ROTHSTEIN ET AL., *supra* note 9, at 337.

108. *See id.* (“In an early trilogy of cases, the Supreme Court mandated liberal tests for determining compensable time.”).

109. *Id.* at 338 (stating that under the Supreme Court tests, any time “spent in production and related activities is clearly compensable”).

110. *Holzapfel v. Town of Newburgh, NY*, 145 F.3d 516, 524 (2d Cir. 1998).

all that is required for the employer to be liable.<sup>111</sup> This is particularly important in the smart-phone office culture, where most workers feel some sort of compulsion to use their smart phones outside of work.<sup>112</sup> Furthermore, companies often appreciate an employee's willingness to be available outside of work.<sup>113</sup> A company would have a hard time denying knowledge of overtime activities if it provided smart phones to non-exempt workers. The Tenth Circuit has found constructive knowledge when an employer creates an on-call system for employees.<sup>114</sup> Providing a smart phone to non-exempt workers with the expectation that they will use it for work would be similar to creating an on-call system. Although not inevitable, there would certainly be an expectation that the smart phone will eventually be used outside of work. If there is no explicit policy telling non-exempt workers to leave their phones at work or to never use it outside of the office, employees may feel as if they are "required" to use the smart phone to constantly stay in touch with the office.

The "required" element could also be imputed if senior employees consistently send e-mails and documents after hours with the expectation that non-exempt workers will check their smart phones during the evening or weekend. The Second Circuit found this to be a reasonable conclusion and stated "[e]ven if the work was not 'reasonably required,' nonetheless the employee may be compelled or pressured by the employer to do it, and if so, should be compensated for doing it."<sup>115</sup>

Employers may also have sufficient actual knowledge to make it appear as if they acquiesced to the uncompensated overtime. The Eleventh Circuit held that an employer had actual knowledge when it received weekly reports showing employees worked more hours than they reported because the employer prohibited overtime.<sup>116</sup> Companies can set up systems to monitor smart-phone use and at the very least managers can monitor the times when e-mails were sent, documents were sent, or calls were made.<sup>117</sup> It would be hard for an employer to

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111. *Id.*

112. *Management Report*, *supra* note 3.

113. Jeffrey M. Schlossberg & Kimberly B. Malerba, *Are Employees Who Check Devices Off Hours Entitled to Overtime Pay?*, N.Y. L.J., May 21, 2007.

114. *Pabst v. Okla. Gas & Elec. Co.*, 228 F.3d 1128, 1133 (10th Cir. 2000).

115. *Holzapfel*, 145 F.3d at 524.

116. *Reich v. Dep't of Conservation & Natural Res.*, 28 F.3d 1076, 1083 (11th Cir. 1994).

117. Russell A. Ventura & Caroline A. Flotron, *Telecommuting*, in 2001 EMPLOYMENT LAW UPDATE 53, 67 (Henry H. Perritt, Jr. ed., 2001) ("It may be easy for an employer to keep track of an employee's hours through computer-generated time reports that enumerate hours and log-on times.").

deny actual knowledge when the e-mails or phone calls were clearly made outside of office hours. An employer's best option to avoid liability is forbidding any unauthorized overtime work and establishing a compliance system.<sup>118</sup> A complete prohibition of smart-phone use may not be practical, but the employer could require that employees make daily reports of their smart-phone use and get approval for working outside of the office.<sup>119</sup> Without policies and procedures in place, companies risk courts looking at the totality of circumstances to determine if employees felt required to use their smart phones outside of work.

### 3. Determining if the Employee's Use of a Smart Phone Is Done "Necessarily and Primarily" for the Employer's Benefit

The final part, "pursued necessarily and primarily for the employer and the benefit of his business," requires an inquiry into whether the employer received any benefit from the work and if it was necessary for the employee to perform the labor outside of the regular working hours.<sup>120</sup> The Supreme Court held traveling down a mine shaft in order to reach the working areas is necessary to production.<sup>121</sup> The Court reasoned that the employer's benefit from production was entirely dependent upon the miners getting to the work areas, and it does not matter that the travel time was not in and of itself productive because nothing in the FLSA "demands that every moment of an employee's time devoted to the service of his employer shall be directly productive."<sup>122</sup> Thus the benefit to the employer does not need to be the actual production of goods or services. This understanding of the phrase, however, seems overly broad because the line of reasoning could be drawn out to almost anything a worker does that is semi-related to work. Theoretically, waking up, eating, putting on clothes, and driving to work (which the Portal-to-Portal Act addressed and limited<sup>123</sup>) could qualify as benefitting the employer's business. As applied to smart-phone use, it could be argued that the employee is ultimately benefitting the employer by simply keeping the phone on his person while away from the office.

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118. ROTHSTEIN ET AL., *supra* note 9, at 338 ("Employers who wish to avoid liability for these hours should forbid unauthorized work beyond the normal working day and establish a system to police compliance with the rule.")

119. Ventura & Flotron, *supra* note 117, at 67.

120. *See infra* Part III.A.

121. Tenn. Coal, Iron & R.R. v. Muscoda Local No. 123, 321 U.S. 590, 599 (1944).

122. *Id.*

123. *See supra* Part II.C.2.

The Second Circuit provides helpful guidance for jury instruction in *Holzapfel*:

If the employee was motivated primarily by his or her own pleasure, then the time was not expended primarily for the employer's benefit and it is not compensable; similarly, if the time was expended primarily to inflate the employee's earnings, then the time was not primarily for the employer's benefit and is not compensable.<sup>124</sup>

Both prongs of the jury instruction help to eliminate the employee using their employer-issued smart phone to take advantage of the FLSA overtime rules. The first prong of the test eliminates an employee using the smart phone for any non-work related functions and claiming overtime merely because the employer issued them the phone. The second prong is also helpful in eliminating an employee doing frivolous tasks in order to incur overtime, although the effectiveness of the instructions is highly dependent upon how the jury views the facts. There is a great potential for abuse with smart phones, especially when employees could spend countless hours scrolling through e-mails or even waiting to write e-mails after hours in order to accumulate overtime.

The Ninth Circuit addressed a similar issue to this and initially noted that there is "no authority . . . which suggests that an employee's labor is not integral and indispensable if it could have been performed during regular hours."<sup>125</sup> The court, however, affirmed the district court's ruling that preliminary activities were not necessary or integral because the activities did not need to be performed before the start of the employee's shift.<sup>126</sup> The court based its ruling on two factors: (1) the employees could have performed the work during regular hours and (2) the company had issued a letter that told employees they were not required to report early.<sup>127</sup> This ruling has two consequences for smart-phone claims.

First, it will play an important role in analyzing an employee's smart-phone use. Courts will have to look at the employee's use with an eye toward whether the work the employee did had to be done outside of the office or whether the employee could have waited to perform the work on the next day in the office. This is a highly factual inquiry but important because an employee could potentially abuse the overtime by replying to e-mails or reviewing documents after hours even though the

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124. *Holzapfel v. Town of Newburgh, NY*, 145 F.3d 516, 523 (2d Cir. 1998).

125. *Lindow v. United States*, 738 F.2d 1057, 1061 (9th Cir. 1984).

126. *Id.* at 1060.

127. *Id.* at 1060-61.

employer's expectation was to have the work done while the employee was on duty. However, any inquiry into this issue will have to take into account the office culture to determine if employees were actually abusing the smart phone or simply striving to meet their employer's expectation for off-duty work. An employee may technically be able to perform the duties the next day, but it may negatively impact the employee with regards to how a manager views the employee's performance.

Second, it makes clear how important it is for a company to enact policies regarding the use of smart phones. As the court noted, the policies will play a factor in determining the compensability of the work. An established smart-phone policy may help an employer avoid liability.<sup>128</sup> The policies also help inform employees of expectations for work done while off-duty.<sup>129</sup> Employees with smart phones need to know if they are expected to respond to e-mails when they are off-duty. Furthermore, exempt employees should be informed of the consequences of encouraging off-duty responses from non-exempt employees.

There remains a potential argument from the on-call line of cases that could affect a court's analysis. The "necessarily and primarily" standard requires work to be pursued for the benefit of the employer, but courts fail to fully examine what constitutes benefit to the employer.<sup>130</sup> A court can easily recognize that an employee using a smart phone after hours can provide productive and tangible benefits in reading and answering e-mails. In on-call cases, however, it is also suggested that the cost efficiency of allowing workers to go home be analyzed against the cost of regular time at work.<sup>131</sup> Employers realize a significant cost benefit by allowing employees to be on-call rather than requiring them to stay at work or increasing employment to make sure the employer's services are always available.<sup>132</sup> Analyzing employer benefit in this manner can lead to the conclusion that the "use of beepers and cell-phones [to keep] employers increasingly in touch with their

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128. AM. BAR ASS'N SECTION OF BUS. LAW, *EMPLOYEE USE OF THE INTERNET AND E-MAIL: A MODEL CORPORATE POLICY 1* (David M. Doubilet & Vincent I. Polley eds., 2002) ("By articulating permitted and prohibited activities, a company may be able to establish its 'good faith,' and demonstrate that certain employee activities were outside the course and scope of employ (thereby avoiding imputed liability for the employees' actions).") [hereinafter MODEL CORPORATE POLICY].

129. *Id.* (stating an electronic communication policy can help protect the company and educate employees).

130. Gretchen Fuss, *Refining the Tenth Circuit's Stance on Employee Rights: The ADA, Free Speech in the Workplace, and the Fair Labor Standards Act*, 79 DENV. U. L. REV. 433, 455 (2002).

131. *Id.*

132. *Id.*

employees . . . may sometimes require compensation.”<sup>133</sup> The idea acknowledges the inherent benefit to the employer in the on-call arrangement and recognizes that any work done while on-call is compensable.<sup>134</sup>

Even though the cost-benefit analysis comes from the on-call line of cases, there is overlap. An employer-issued smart phone, with no company directive not to use the smart phone while off-duty, is similar to a beeper or cell phone issued for on-call duty. Therefore, the same cost-benefit analysis is potentially present with smart-phone use. An employee could spend thirty minutes of compensable time answering e-mails that came in after regular work hours, or the employee could spend three hours in the office waiting for the e-mails and be compensated for three hours. There is the same inherent benefit for the employer with smart-phone use as there is in on-call employment. Allowing compensation for beeper or cell-phone use seems to make legitimate smart-phone use presumptively compensable. This only further highlights the need for employers to adopt policies and procedures that deal with smart-phone use.

#### 4. Potential Court Outcome

As the Supreme Court stated, “whether time is spent predominantly for the employer’s benefit or for the employee’s is a question dependent upon all the circumstances of the case.”<sup>135</sup> But using a smart phone can easily fit into the broad definition of “work” under the Supreme Court’s interpretation in *Tennessee Coal*.<sup>136</sup> The requirement that an employee’s exertion does not need to be burdensome easily includes responding to e-mails, reviewing documents, or doing Internet research for the company. A potential claim that includes the above-listed duties would certainly fit into the Court’s definition of “work” because the Court did not set a threshold level of exertion and such duties all involve some level of mental exertion.

Whether the work must be required by the employer is not quite as clear, but the courts are allowed to look beyond explicit directions from

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133. *Id.*

134. See ROTHSTEIN ET AL., *supra* note 9, at 338–39 (“Constraints on an employee’s freedom are, however, inherent in the concept of being on call and do not by themselves render on-call time compensable.”).

135. *Armour & Co. v. Wantock*, 323 U.S. 126, 133 (1944).

136. 321 U.S. 590, 598 (1944).

employers to determine if employees feel compelled to work.<sup>137</sup> The best evidence that employees are required to use their smart phones while off-duty is specific employer policies noting the requirements. Employers that issue smart phones, however, may want to reexamine their e-mail policies, as they could now be viewed as encouraging frequent e-mail checking.<sup>138</sup> In the absence of official policies, the office culture and the behavior of senior employees may establish a culture where employees feel compelled to use their phones. Courts will likely find employees felt required to use the smart phone while off-duty in offices where the company issues smart phones to non-exempt employees, senior employees frequently send e-mails to non-exempt employees after office hours, and the company encourages and rewards non-exempt employees who go beyond the requirements of their job descriptions.

Finally, when determining if the work was pursued necessarily for the benefit of the employer, the courts will look at the nature of the work and any company policies addressing the issue of overtime. Company policies specifically stating certain work does not qualify as overtime or overtime is not allowed in certain instances are the best evidence that the employee's work was not necessary. The inquiry into the nature of the work requires looking at why the employee was performing the work. For overtime claims based on smart phones, this may be the hardest aspect to prove because the employee will have to prove the off-duty use of the phone was necessary and benefitted the employer. Additionally, an employee will have to definitively show that he was not taking advantage of the employer to accumulate overtime hours and that the work claimed was not done for pleasure. Courts will likely find the smart-phone use was necessary for the benefit of the employer if the employee shows the work performed was an integral and indispensable part of the job, there were no company policies explicitly disallowing overtime, and the employee shows there was no abuse of the system.

Given the right set of facts, an employee bringing an overtime claim under the FLSA based on his off-duty use of a smart phone could certainly be successful under the Supreme Court's broad definition of

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137. *Holzapfel v. Town of Newburgh, NY*, 145 F.3d 516, 524 (2d Cir. 1998).

138. See MODEL CORPORATE POLICY, *supra* note 128, at xxv. The suggested model for corporate e-mail policy states:

Reading your e-mail is a professional responsibility, just like answering your telephone. As a general rule, you should check your e-mail at least twice a day when you're not traveling. When on the road, e-mail should be checked as often as possible or you can enable a colleague to check it for you.

As a model this may be appropriate for computer-based e-mail but also could have undesirable implications on checking e-mail with smart phones.

“work.” Courts have often followed this broad definition and consistently found off-duty work is compensable in certain cases, and the subsequent litigation usually involves determining reasonable compensation for the work.<sup>139</sup> However, Congress has enacted amendments and the courts have created judicial exceptions that could negate many of the claims.

*B. Congressional Amendments and Judicial Rulings Limiting the Supreme Court’s Broad Definition of “Work”*

Congress and the courts have attempted to limit the applications of the broad definition of “work” set forth in *Tennessee Coal*.<sup>140</sup> The courts have worked to eliminate unexpected liabilities for trivial matters with the de minimis doctrine, which addresses small amounts of time that are hard to accurately compute or work that is so miniscule it may not qualify as work.<sup>141</sup> Concerned with the broadness of the Supreme Court’s definition of “work” creating “unexpected liabilities,” Congress enacted the Portal-to-Portal Act.<sup>142</sup> Additionally, the courts have decided several cases addressing whether or not to compensate for on-call duty, and the facts of these cases will be analogous to any claims based on smart-phone use.<sup>143</sup> The next section of this Comment will attempt to determine how courts will analyze an employee’s use of a smart phone under the applicable exceptions and case law.

1. The De Minimis Doctrine’s Impact on Smart-Phone Claims

The de minimis doctrine was first mentioned in *Anderson v. Mt. Clemens Pottery Co.* to address the industrial realities of computing time.<sup>144</sup> The doctrine was not applied in the case but its use was foreshadowed in future claims where “precisely accurate computation is difficult or impossible.”<sup>145</sup> Industrial realities and accurate overtime

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139. See Paul A. Campo, *Law Enforcement Issues and the FLSA*, 56 J. MO. B. 336, 339–40 (2000) (addressing canine officer cases where courts have found the off-duty work compensable).

140. See *supra* Part II.B.1.

141. *Brock v. City of Cincinnati*, 236 F.3d 793, 801 (6th Cir. 2001); see *supra* Part II.C.1.

142. *Bobo v. United States*, 37 Fed. Cl. 690, 692 (1997); see *supra* Part II.C.2.

143. See *Adair v. Charter County of Wayne*, 452 F.3d 482 (6th Cir. 2006); *Reimer v. Champion Healthcare Corp.*, 258 F.3d 720 (8th Cir. 2001); *Pabst v. Okla. Gas & Elec. Co.*, 228 F.3d 1128 (10th Cir. 2000); *Dinges v. Sacred Heart St. Mary’s Hosps., Inc.*, 164 F.3d 1056 (7th Cir. 1999); see *supra* Part II.C.3.

144. 328 U.S. 680, 692 (1946).

145. *Brock*, 236 F.3d at 801 (quoting *Tenn. Coal, Iron & R.R. v. Muscoda Local No. 123*, 321 U.S. 590, 603 (1944)).

calculation are particularly relevant to the smart-phone inquiry. The industrial realities test focuses on the fact that smart-phone use can constitute a quick glance at an e-mail or a quick reply to tell a co-worker you will be at a meeting. These examples of work would probably take far less time to complete than the ten minute standard usually applied as a threshold for the de minimis doctrine.<sup>146</sup> Second, the smart-phone use is often done away from the office, and there is no accurate way to precisely measure how long an employee was working on the phone. Therefore, it is appropriate to analyze potential smart-phone claims under the de minimis doctrine. The *Lindow* court developed a three-factor test for applying the de minimis doctrine.<sup>147</sup>

a. The First Factor of the *Lindow* Test

The Supreme Court, in *Anderson v. Mt. Clemens Pottery Co.*, stated: “When the matter in issue concerns only a few seconds or minutes of work beyond the scheduled working hours, such trifles may be disregarded.”<sup>148</sup> The Ninth Circuit, in *Lindow*, addressed this concern, and the first factor requires consideration of “the practical administrative difficulty of recording the additional time.”<sup>149</sup> The court pointed to the difficulty of monitoring work that was done pre- and post-shift but on the employer’s premises.<sup>150</sup> This concern would be magnified in a smart-phone claim because the work would most likely take place away from the employer’s premises. Without a program or system to monitor the employee’s smart-phone use, the employer would be entirely reliant on employee self-reporting, which could be easily abused.<sup>151</sup>

*Lindow* was specifically concerned with an employee being present at work but not engaging in compensable work, such as conversing with other employees.<sup>152</sup> Similarly, in a smart-phone claim, employers will be concerned that an employee’s overtime claim involved an intertwining of compensable work and personal smart-phone use. The rise in the use of electronic means of communication at work has raised similar concerns regarding the use of company computers and Internet for personal e-

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146. *Lindow v. United States*, 738 F.2d 1057, 1062 (9th Cir. 1984).

147. *Id.* at 1063.

148. *Anderson*, 328 U.S. at 692.

149. *Lindow*, 738 F.2d at 1063.

150. *Id.* at 1064.

151. See *Ventura & Flotron*, *supra* note 117, at 73 (stating that the lack of an established policy to track a telecommuter’s overtime hours could lead to abuse).

152. *Lindow*, 738 F.2d at 1063–64.

mail.<sup>153</sup> Employers may determine that it is in their best interest to allow some personal use of e-mail in fairness to the employee because the employee is now expected to work beyond the traditional working hours.<sup>154</sup> It is, however, suggested that this approach may not translate for cell phones.<sup>155</sup> This only serves to emphasize the importance of policies specifically addressing smart-phone use.

Despite the potential for abuse, under the Supreme Court's broad definition of work, it is likely that an employee's smart-phone use will be deemed compensable, exposing an employer to lengthy and costly litigation in order to determine the amount of compensation owed to the employee. It is therefore important to analyze the application of the de minimis doctrine to smart-phone claims.

Although *Anderson* was written over sixty years ago, briefly checking e-mail for a few seconds or minutes seems to be exactly the type of "trifle" that would create an administrative difficulty for an employer.<sup>156</sup> The initial burden lies with the employee to prove that the time spent engaged in preliminary or postliminary work is not de minimis.<sup>157</sup> Furthermore, in the absence of official records, the employee must provide sufficient evidence detailing the amount of work.<sup>158</sup> At this point the burden shifts to the employer to negate any inference that can be drawn from the employee's evidence.<sup>159</sup> In the best case scenario, both the employee and employer would keep track of smart-phone use. Ideally an employer could keep track of an employee's hours using computer reports,<sup>160</sup> and the employee could supplement this information with daily reports on hours worked.<sup>161</sup> In this scenario, the employer would have an accurate reporting of overtime and be able to control the employee's smart-phone use before it became too expensive.

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153. See MODEL CORPORATE POLICY, *supra* note 128, at 3 (arguing that the complete prohibition of personal e-mail is hard to enforce and often ignored by employees).

154. See *id.* (stating that as more employees work at non-traditional times, "it may be fair to permit employees to take care of some 'personal business' during 'company time'").

155. See *id.* at 4 (stating that personal e-mail policies may not be applicable with respect to the use of cell phones).

156. See *Lindow*, 738 F.2d at 1064 (holding that time spent checking a log book is de minimis and not recoverable).

157. LAURIE E. LEADER, WAGES & HOURS: LAW AND PRACTICE § 6.02(2)(c) (2009) [hereinafter WAGES & HOURS].

158. *Id.* § 6.02(2)(d).

159. *Id.*

160. Ventura & Flotron, *supra* note 117, at 67 ("It may be easy for an employer to keep track of an employee's hours through computer-generated time reports that enumerate hours and log-on times.").

161. *Id.* (stating that nonexempt employees should be required to report the hours worked on a daily basis and get approval for any work "beyond a certain number of hours").

Even in the absence of accurate timekeeping, the employer is still required “to exercise its control and ensure compliance with labor laws.”<sup>162</sup> Without an accurate timekeeping system, potential evidence of compensable smart-phone use is difficult to quantify. In order to prove hours worked, an employee may produce records of e-mails sent using a smart phone, making sure to note the time they were sent and the frequency with which it was done while off-duty. Problematically, e-mails typically only show the time sent or received but not how much time went into creating the e-mail. Potentially, the length of the e-mail could be examined to estimate how long the employee spent writing the e-mail. Additional evidence might include bills showing the amount of data sent and received and total phone-call time. Even after looking at all this evidence, there would most likely be an inaccurate picture of actual time worked. The result in this situation would probably not satisfy either the employer or the employee.

A potential problem with the de minimis doctrine’s application to potential smart-phone claims is its emphasis on time rather than the substance of the work performed. Generally, the de minimis doctrine was designed to prevent employers from having to compensate for insubstantial amounts of time.<sup>163</sup> The de minimis standard is generally set at ten minutes, with some courts holding fifteen minutes is not enough to overcome the de minimis doctrine and warrant compensation.<sup>164</sup> However, significant and substantive smart-phone work can be done in less than ten to fifteen minutes. One could argue that the Supreme Court of the 1940s would not think many of the tasks performed on a smart phone were trifles compared to the type of work the de minimis doctrine was meant to address. Smart phones are designed to enhance an employee’s productivity, but an employee should not be penalized because the smart phone allows the employee to complete tasks much faster. This idea goes back to the cost-benefit analysis discussed earlier.<sup>165</sup> Based strictly on the judge-made time constraints, the de minimis doctrine would eliminate compensation for writing an e-mail in under ten minutes with no examination of the benefits the employer received.

In a de minimis doctrine situation the court may have to look beyond the employee’s time and look into the substantive effects of the

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162. *Id.* at 66.

163. Amanda (Amy) M. Riley, *The De Minimis Rule: Trifles of Time*, 45 ORANGE COUNTY LAW. 18, 18 (2003).

164. *Id.*

165. *See supra* Part III.A.3.

employee's smart-phone use.<sup>166</sup> It is unfair to not compensate an employee who used a smart phone during off-duty time to set up meetings that led to new business because the time spent was in small amounts that failed to pass the de minimis doctrine.<sup>167</sup> Curing such unfairness would require looking exactly at the type of work the employee did rather than looking only at the compensable time claimed.<sup>168</sup> Evidence of substantive smart-phone use is potentially more accurate than attempting to calculate time because the focus would be on tangible content and its impact on the employer. A look at the content of the smart-phone use could also provide evidence that the employee's work was frivolous or insubstantial and properly falls under the de minimis doctrine. A look at the substantive aspects of smart-phone use is important because, even today, the de minimis doctrine is discussed in regards to small tasks like turning on lights, starting equipment, and opening the office.<sup>169</sup> Substantive and beneficial smart-phone use should not be put into the same category as flipping switches and turning on machines.

The de minimis doctrine is also addressed specifically to preliminary and postliminary work done at the employer's premises. The facts of *Lindow* can be distinguished from potential smart-phone claims because the case addressed the seconds and minutes of labor done directly before or after regularly scheduled work while the employee was still on the premises.<sup>170</sup> Additionally, the *Lindow* case involved workers claiming overtime for the fifteen minutes before work on the employer's premises.<sup>171</sup> The smart phone, however, is inherently designed to allow an employee to work while away from the office. This is a distinguishing factor that may make the de minimis doctrine inappropriate in the smart-phone context because most potential smart-phone claims will involve time spent at home or on the road but not in the office. However, the *Lindow* test's first inquiry intends to eliminate administrative impracticalities, and the smart phone presents a great deal

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166. See Eric Phillips, Note, *On-Call Time Under the Fair Labor Standards Act*, 95 MICH. L. REV. 2633, 2645 ("In fact, the value of the service to the employer was an important consideration in Congress's establishment of the minimum wage.")

167. *Id.* at 2644 (arguing that the courts should also examine the benefit to the employer which is "consistent with Supreme Court precedent and with the equitable concerns that were central to the passage of the FLSA").

168. *Id.* at 2654 ("The objective character of the on-call duty, not the employee's or the employer's characterization of it, should be the central concern.")

169. *Determining Hours Worked, Part III*, 2007 PAYROLL PRAC. MONTHLY 1, 10 [hereinafter *Determining Hours Worked*].

170. *Lindow v. United States*, 738 F.2d 1057, 1064 (9th Cir. 1984).

171. *Id.* at 1063-64.

of administrative problems. Thus the de minimis doctrine is still an appropriate place to look when addressing smart-phone claims, but courts may have to expand the inquiry beyond just time.

b. The Second Factor of the *Lindow* Test

The second factor of the *Lindow* test is to “consider . . . the aggregate amount of compensable time.”<sup>172</sup> The de minimis doctrine allows the aggregation of minimal claims that were done on a daily basis.<sup>173</sup> The courts were worried about the inherent unfairness of awarding one employee \$50 for one week’s worth of overtime but not giving any compensation to an employee who earns \$1 a week for fifty weeks.<sup>174</sup> Does this mean that an employee who checks his smart phone for work e-mail (assuming that the court finds it constitutes compensable work) for one minute, five times an evening while at home can aggregate this time as compensable work to receive twenty-five minutes of overtime for the week? Allowing aggregation has two separate implications: (1) it creates the potential for employee abuse or (2) it is helpful in fairly compensating employees for work that would otherwise be de minimis.

First, employees can too easily aggregate time on a smart phone with little to no effort. Allowing workers to aggregate brief e-mail checks would open up employers to countless hours of unexpected compensable time. Employers should be specifically concerned with the recommendation that overtime calculations should be rounded to the “nearest five minutes, one-tenth or quarter hour.”<sup>175</sup> Rounding in addition to aggregation would significantly increase the amount of compensable time claimed. For example, three minutes a day for ten days is thirty minutes of compensable time but rounding three minutes to five minutes for ten days increases the total to fifty minutes of compensable time. The discrepancy would only increase with longer aggregation, as would the potential liability for the employer. As mentioned in regards to the first prong of the *Lindow* test, the Supreme Court stated in dicta that the de minimis doctrine was intended to make sure employers were not compensating workers for small amounts of time that the Court considered a “trifle.”<sup>176</sup> Some courts have followed

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172. *Id.* at 1063.

173. *Id.*

174. *Id.*

175. Riley, *supra* note 163, at 19.

176. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 692 (1946).

this idea and dismissed insubstantial aggregate claims as groundless and unreasonable.<sup>177</sup>

Alternatively, aggregation may be an appropriate context when looking at potential smart-phone claims. Strictly applying the ten-minute common law rule from the de minimis doctrine may unfairly eliminate an employee's claim for overtime without examining if it should be compensable. Fairness is an important aspect of allowing aggregation.<sup>178</sup> As discussed above, significant and substantive work can be accomplished on a smart phone in the amount of time the courts consider de minimis. Employees, however, should not be denied compensation for using a smart phone to quickly take care of work while off-duty if the work provided a benefit to the employer. In a court that strictly follows the de minimis doctrine, aggregation may be the only way an employee can pursue a smart-phone claim because the employee's time spent using the smart phone falls under ten minutes. The burden still rests with the employee to produce evidence that the smart-phone use was not an "isolated incident[] or [a] small amount[] of overtime on a sporadic basis."<sup>179</sup> If the employee is able to meet this burden, the general feeling is "repeated days of de minimis overtime are unquestionably compensable."<sup>180</sup> Aggregation is an important factor for both the employee and the employer to note when evaluating a smart-phone claim because it could potentially make an employee's claim viable or exponentially increase an employer's liability.

Since mentioning the de minimis doctrine in dicta, the Supreme Court has not fully defined the rule.<sup>181</sup> In the absence of an official ruling, the DOL issued a memorandum taking the position that "discrete periods of time which the employer classifies as de minimis must be aggregated, and when aggregated the total time spent may not meet the de minimis standard."<sup>182</sup> The implication is that a court may find certain activities are de minimis, but because they are required to be aggregated, the total time exceeds the de minimis standard, which weakens the effect

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177. *Lindow*, 738 F.2d at 1063.

178. See *Addison v. Huron Stevedoring Corp.*, 204 F.2d 88, 95 (2d Cir. 1953) ("To disregard workweeks for which less than a dollar is due will produce capricious and unfair results.").

179. *Riley*, *supra* note 163, at 18.

180. *Id.* at 19.

181. Lynn M. Carroll, Comment, *Employment Law—Fair Labor Standards Act Requires Compensation for Employees Walking To and From Workstations—IBP, Inc. v. Alvarez*, 126 S. Ct. 514 (2005), 40 SUFFOLK U. L. REV. 769, 776 (2007).

182. Ellen C. Kearns, *The De Minimis Doctrine*, 2006 A.L.I.—A.B.A. COURSE OF STUDY: ADVANCED EMP. L. LITIG. 709, 720.

of the de minimis doctrine.<sup>183</sup> Consequently, the de minimis doctrine may not have any effect in a smart-phone claim because the time spent will be automatically aggregated and compensable because the aggregated amount of time exceeds the de minimis standards.<sup>184</sup>

c. The Third Factor of the *Lindow* Test

The third factor of the *Lindow* test is to “consider . . . the regularity of the additional work.”<sup>185</sup> This test, like the second prong of the *Lindow* test, has two separate implications. First, in most cases, it is not very hard for employees to regularly check their smart phone while off-duty. The ease with which an employee can check a smart phone to create work was certainly not envisioned when the de minimis doctrine was established.<sup>186</sup> Employees can create regularity on their own, possibly defeating the impact of this aspect of the *Lindow* test. Just as courts take into account fairness to the employee, it would be unfair to the employer for an employee to artificially create regular work in order to receive overtime compensation. Again, the de minimis doctrine was intended to eliminate “trifle” claims of compensable work, and regular checking of the smart phone cannot raise the activity above a “trifle.”

Second, the third prong provides an additional avenue for the court to judge an employee’s smart-phone claim on factors other than time.<sup>187</sup> As mentioned above, strict readings of the ten-minute rule may eliminate a compensable smart-phone claim but the outcome may change if the court takes into account the regularity of the employee’s use of the smart phone. The regularity aspect can be proven either through evidence of explicit instructions from the employer regarding off-duty work or through an office culture that implicitly requires employees to stay in regular contact with the office even while off-duty. In smart-phone cases, regularity can be quantified by looking at the number of e-mails sent, the amount of data sent, or phone-call logs. The inquiry into the

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183. See *id.* (stating the DOL’s position “significantly diminishes the effect of a de minimis finding, and may in fact mean that de minimis findings will be rare indeed”).

184. *Id.* (stating aggregated working time is compensable when it exceeds the de minimis standard).

185. *Lindow v. United States*, 738 F.2d 1057, 1063 (9th Cir. 1984).

186. See Daniel V. Yager & Sandra J. Boyd, *Reinventing the Fair Labor Standards Act to Support the Reengineered Workplace*, 11 LAB. LAW. 321, 322 (1995) (“It is difficult to believe that it is sound policy for Depression-era wage and hour laws to govern the workplace of the twenty first century.”).

187. See *Determining Hours Worked*, *supra* note 169 at 10 (“The regularity or frequency of the time periods is a consideration.”).

regularity with which the work was performed takes the focus off strictly looking at time spent working.

Even with the factors set forth above, a *de minimis* doctrine inquiry must focus on determining the nature of the employee's work. Merely scrolling through e-mail on a smart phone should fall into the category the *de minimis* doctrine attempts to eliminate from compensable work. In contrast, writing reply e-mails involves much more exertion on the employee's part. An employee writing reply e-mails on a regular basis while off-duty could be aggregated to form a significant overtime claim. This necessarily follows from the reasoning set forth above, which concludes it would be unfair to compensate an employee for staying one hour after work to e-mail clients and not to compensate an employee who spent one hour spread over four weeks e-mailing clients.

More importantly, the potential for abuse, the probable lack of sufficient evidence, and the courts' focus on fairness makes it imperative for the employer to develop policies and procedures rather than rely on the *de minimis* doctrine to eliminate smart-phone claims. A major aspect of smart-phone claims would be the evidence provided because a lack of sufficient evidence is a detriment to the employee and employer. To address the potential lack of evidence, employers could require all non-exempt employees to copy their managers when sending off-duty e-mails, which would form a practical basis for computing the overtime work because the employer would have a record of the work performed. Employers, however, are better off developing preventive policies addressing an employee's use of a smart phone while off-duty. Courts routinely rely on "contract terms, custom, or practice" when attempting to compute compensable work in situations where it is impossible to determine precise numbers.<sup>188</sup> A smart-phone claim is likely to involve a substantial amount of difficulty in computing hours worked, which makes contracts, custom, or practice particularly important. It is likely courts will use the *de minimis* doctrine to examine a smart-phone claim, but the potential outcome will be highly dependent upon the available evidence and facts. Facts analogous to a potential smart-phone claim have yet to be tested in the courts and attorneys who deal in employment matters are quick to point out that courts may not follow the *de minimis* rules as expected.<sup>189</sup>

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188. See *WAGES & HOURS*, *supra* note 157, § 6.02(2)(d).

189. Foulston Siefkin LLP, *Employees Walk Away with High Court Victory*, KAN. EMP. L. LETTER Dec. 2005, at 2; Riley, *supra* note 163, at 19. See also Carroll, *supra* note 181, at 776 (stating the Supreme Court "failed to fully define the scope of . . . the *de minimis* rule").

## 2. The Portal-to-Portal Act's Effect on Smart-Phone Claims

The Portal-to-Portal Act was another attempt to limit the broad definition of work and stop the creation of “unexpected liabilities” for companies.<sup>190</sup> The applicable portion of the Portal-to-Portal Act eliminates liability for “activities which are preliminary to or postliminary to [the employee’s] principal activity or activities.”<sup>191</sup> The Portal-to-Portal Act also gives effect to express provisions of contracts, written or nonwritten, and to customs and practices.<sup>192</sup> The Portal-to-Portal Act provides an important analytical framework for examining potential smart-phone claims because it takes into account the substantive content of the work rather than only looking at time like the *de minimis* doctrine.

The section of the Portal-to-Portal Act eliminating liability for preliminary and postliminary work not related to the principal activity requires a court to look at the content of the employee’s smart-phone use. This is similar to the approach suggested earlier, which argued that the *de minimis* doctrine’s application to smart-phone use must also look at the substantive content of the work in addition to strictly looking at the time.<sup>193</sup> In most cases, using a smart phone to write an e-mail to a client or to review documents is related to the principal activity of the employee, but using the smart phone while off duty to look for restaurants or to shop would be unrelated to the principal activity. This distinction is relatively easy to grasp with adequate evidence.

An employer can further challenge smart-phone claims on the basis of the claim’s relationship to the employee’s principal activity. In this instance, a court looks at whether or not the work was “‘integral and indispensable’ to the principal activity.”<sup>194</sup> Work-related e-mails may be related to work, but the “integral and indispensable” requirement needs to be addressed to determine the legitimacy of the smart-phone claims. In interpreting the Portal-to-Portal Act, the *Steiner* Court determined “the principal activity of battery production could not be accomplished without protecting employees from toxic chemicals, the protective measures were integral and indispensable to, and therefore a part of, that principal activity.”<sup>195</sup> The industrial setting provides a clearer line

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190. *Steiner v. Mitchell*, 350 U.S. 247, 253 (1956).

191. 29 U.S.C. § 254(a)(2) (2006).

192. *Id.* § 254(b)(1)–(2).

193. *See supra* Part III.B.1.

194. *Neville F. Dastoor & Shane T. Muñoz, IBP v. Alvarez*, FLA. B.J., Feb. 2006, at 37, 37.

195. *Id.* at 37–38.

between what is and what is not an “integral and indispensable” activity, but the intent of the ruling can be applied to smart-phone claims. Using a smart phone to set up important client meetings may be “integral and indispensable,” while using a smart phone to purchase work supplies may not be “integral and indispensable.”<sup>196</sup> As such, a court’s inquiry would be fact-intensive to ensure a claim for overtime was related to the employee’s principal activities.

The fact-intensive inquiry highlights a potential problem with the application of the Portal-to-Portal Act to smart-phone claims. The main problem is that the Portal-to-Portal Act was interpreted in an industrial setting and has been applied to activities like driving to work, walking to work, or activities taking place immediately before and after work.<sup>197</sup> Smart-phone claims can be distinguished because the compensable claims will often occur well after the employee has left the employer’s premises. Even its name seems to suggest that the Act addresses the act of entering and leaving the employer’s premises. The Portal-to-Portal Act, however, does place an emphasis on looking at the content of the work in relation to its importance to the employer and the employee’s activities.<sup>198</sup> Following this approach, courts may want to look into the substantive content of potential smart-phone claims before deeming them compensable.

Another important aspect for employers is the Portal-to-Portal Act’s rules on recognizing contracts and customs and practices addressing the compensation for overtime.<sup>199</sup> The recognition of a contract places the responsibility on the employer to make sure they address potential issues knowing they have a statutory assurance the contracts will be recognized under the FLSA. It is also important for employees because a contract can allow compensation for activities that would normally be excluded.<sup>200</sup> Furthermore, the customs and practices aspect could play a pivotal role. Custom and practice recognition, however, is limited to a particular employer’s customs or practices, and any industry custom is

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196. See Rachael Langston, *IBP v. Alvarez: Reconciling the FLSA with the Portal-to-Portal Act*, 27 BERKELEY J. EMP. & LAB. L. 545, 552 (2006) (arguing courts have not consistently defined what is “integral and indispensable” to the principal activity).

197. WAGES & HOURS, *supra* note 157, § 6.02(2)(a)–(b).

198. See Langston, *supra* note 196, at 551 (“The Court concluded by stating that to characterize as a primary activity an activity that is two steps away from the actual productive activity of employment would expand employer liability in exactly the manner that Congress intended the PPA to prevent.”).

199. See WAGES & HOURS, *supra* note 157, § 6.02(2)(b); *cf.* Phillips, *supra* note 166, at 2649 (arguing that allowing employers to contract around on-call time contradicts the FLSA).

200. WAGES & HOURS, *supra* note 157, § 6.02(2)(d).

irrelevant in determining compensation for hours worked.<sup>201</sup> This limitation allows courts to account for an office culture that emphasizes off-duty work and keeping in constant contact with the office. Additionally, an employment contract or bargaining agreement can render any employer custom irrelevant in determining compensation.<sup>202</sup> This only serves to reinforce the idea of employers taking preventative measures to ensure employees know which activities will be compensated and which will not be compensated.

The Portal-to-Portal Act continues the trend of creating limitations to the FLSA's broad definition of "work." First, the Act emphasizes the general feeling that not everything done relating to work should be compensated. Second, the Act's "principal activity" requirements aim to eliminate any liability owed to a non-exempt employee whose claims are based solely on being required to have a smart phone or for using the smart phone for non-business activities. Third, the Act provides a framework for analyzing the substantive content of an employee's overtime claim rather than just looking at the time spent. Finally, the Act highlights the legal importance of employers developing preventative measures.

### 3. The Impact of On-Call Case Precedent on Smart-Phone Claims

On-call cases are particularly helpful in analyzing smart-phone claims because both have the common aspect of the employee being in constant contact with the employer. Additionally, like smart-phone claims, the FLSA does not explicitly address on-call time.<sup>203</sup> The Supreme Court developed two inquiries relevant in on-call cases: (1) "whether an employee is 'engaged to wait' or 'waiting to be engaged'" or (2) "whether on-call time is spent predominantly for the benefit of the employer or the employee."<sup>204</sup> Both inquiries are "individualized and fact-based."<sup>205</sup>

Typical on-call arrangements involve some restrictions on workers' at-home activities.<sup>206</sup> The "engaged to wait" versus "waiting to be

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201. *Id.*

202. *Id.*

203. *Pabst v. Okla. Gas & Elec. Co.*, 228 F.3d 1128, 1132 (10th Cir. 2000).

204. *Id.*

205. *Id.* See also Phillips, *supra* note 166, at 2636 ("In light of the predominantly factual basis of the question raised in on-call cases, a mechanical test likely cannot resolve the issue. Courts therefore must examine all the circumstances involved in the on-call arrangement.").

206. See *Dinges v. Sacred Heart St. Mary's Hosps., Inc.*, 164 F.3d 1056, 1057 (7th Cir. 1999) (noting on-call employees must live within a seven-minute radius of the hospital, cannot consume

engaged” inquiry turns on “the degree to which the burden on the employee interferes with his or her personal pursuits.”<sup>207</sup> When on-call duty heavily restricts an employee’s personal activities the courts weigh this in favor of the time being compensable.<sup>208</sup> However, “[a]n employee who is not required to remain on the employer’s premises but is merely required to leave work at home or with company officials where he or she may be reached is not working while on call.”<sup>209</sup> There are three relevant factors that the court can look at to determine the burden on the employee: “the number of times an employee is interrupted or called back to work; . . . the duration of the callbacks and interruptions; and . . . the amount of time an employee has before he must return to work.”<sup>210</sup> These factors should all be taken into account to determine if the burden is compensable, but it is possible for one factor to be particularly burdensome and, therefore, compensable by itself.<sup>211</sup>

When analyzing the burden, the courts look at the number of calls an on-call employee receives and the time spent on each call, and the more calls an employee receives the more likely the time is compensable.<sup>212</sup> The employee is being interrupted each time the employee answers a call or e-mail. Frequent interruptions signify a burden on the employee because the employee cannot engage in off-duty activities.<sup>213</sup> This analysis can be used in smart-phone claims because quantifiable statistics should be available. In addition to calls and call time, the court can look at the number of e-mails sent and received while off-duty.

The court should also examine the length of the interruptions. The longer the interruption, the less time an employee has for personal activities and the more likely the time will be viewed as compensable.<sup>214</sup> An interruption that merely requires a quick answer from an employee is less of a burden.<sup>215</sup> This idea seems similar to the *de minimis* doctrine. As such, quick answers may not be compensable as single incidents but could be aggregated into compensable time.

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alcohol, and cannot engage in activities that would impair their ability to hear their pager such as lawn mowing or attending concerts).

207. *Selected Labor & Employment Law Updates*, 3 U. PA. J. LAB. & EMP. L. 355, 356 (2001).

208. *Dinges*, 164 F.3d at 1058.

209. *Id.* (quoting DOL regulations in 29 C.F.R. § 553.221(d)).

210. Phillips, *supra* note 166, at 2641.

211. *Id.* (“When one element is especially burdensome, however, it may by itself compel compensation.”).

212. Fuss, *supra* note 130, at 454.

213. Phillips, *supra* note 166, at 2641.

214. *Id.* at 2642.

215. *Id.*

The final factor looks at the response time the employer requires, and it is argued that a short response time weighs in favor of compensation.<sup>216</sup> In a smart-phone claim, the court could look at whether the employer required the employee to respond to off-duty e-mails or allowed them to answer the e-mails the next day at work. Additionally, requiring on-call employees to constantly monitor and respond all day weighs heavily in favor of compensability.<sup>217</sup> In this instance, an employee is acting entirely for the benefit of the employer. Requiring an employee to use his smart phone to promptly reply to any e-mails sent after work would likely make the work compensable because the employee would have to constantly monitor his smart phone while off duty.<sup>218</sup> These employer requirements would most likely restrict the employee's ability to use his time effectively for personal activities, eliminating any benefit to the employee.

Despite many similarities, there is a distinction between on-call duty and smart-phone use. On-call duty typically requires the employee leave his house and return to the office or work site, but smart-phone use can be done while an employee is sitting at home. Therefore, the physical burden of on-call duty is probably much greater than the physical burden any smart-phone user would experience. However, this does not mean smart-phone users are not working, but it means the court's inquiry necessarily returns to determining if the employee's use of the smart phone constitutes compensable work. The on-call cases provide a helpful framework for employers looking to develop policies on off-duty smart-phone use.

### C. *Potential Solutions for Employers*

Employment attorneys caution employers against relying on courts interpreting wage-and-hour cases in a predictable and favorable manner.<sup>219</sup> The *de minimis* doctrine, Portal-to-Portal Act, and on-call cases may not provide on-point precedent to deal with potential smart-phone litigation, but they do highlight the importance of developing preventative policies and what should be included in those policies.<sup>220</sup>

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216. Fuss, *supra* note 130, at 454–55.

217. Pabst v. Okla. Gas & Elec. Co., 228 F.3d 1128, 1134 (10th Cir. 2000).

218. See Phillips, *supra* note 166, at 2642 (“Like the requirement that an employee remain on the employer’s premises while on call, a short response time can restrict the activities an employee may pursue while on call.”).

219. Foulston Siefkin LLP, *supra* note 189, at 2, 3; see Riley, *supra* note 163, at 19 (noting the *de minimis* rule appears yet to be tested at the local level and, therefore, kept flexible).

220. See MODEL CORPORATE POLICY, *supra* note 128, at 2 (“Company communication tools are

The first step any employer should take is to analyze the need for non-exempt employees to have smart phones. Prohibiting non-exempt employees from accessing company-issued smart phones effectively eliminates the potential for most wage-and-hour litigation. From a practical standpoint, non-exempt workers will not have smart-phone access on which to base a claim. The prohibition also establishes evidence of an employer's custom and practice of not expecting or intending to have non-exempt workers use smart phones, which was recognized as significant evidence in the Portal-to-Portal Act.<sup>221</sup> If this is not possible, the employer should focus on communicating with the employees orally and through contract regarding overtime expectations and limitations.<sup>222</sup> Employers should consider requiring that all employees receive approval to work overtime.<sup>223</sup> This would allow employers to have more control of employee overtime and prevent employees from performing unnecessary but compensable work while off-duty. Additionally, it provides further evidence of the employer's customs and practices. Employers, however, cannot contract around paying employees for compensable work.<sup>224</sup>

If an employer determines that it must give non-exempt employees access to smart phones, then the employer should consider requiring the employee to sign a contract detailing the expectations, requirements, and compensation policies regarding smart-phone use.<sup>225</sup> Contracts and bargaining agreements explicitly inform the employee of smart-phone policies and supersede any company customs and practices.<sup>226</sup> Contracts should address how the employer wants the employee to use the smart phone. The contract could state specific times for using the smart phone, provide the employer's expectations for responding to calls and e-mails received after regular work hours, and set up guidelines for how to properly record off-duty smart-phone use. The contract should also attempt to limit all unwanted employee overtime. Employers may want

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just that—they belong to the Company. Use of these communication tools is permitted *in order to further the Company's legitimate business interests*. Ownership of the communication tools permits the Company to recover possession, and to set conditions and regulations on their use.”).

221. See *supra* Part III.B.2.

222. Perkins Coie, *supra* note 88, at 5.

223. *Id.*

224. Phillips, *supra* note 166, at 2651 (stating “nothing in the [FLSA] text suggests that an employer may contract around the requirement that all employees receive compensation for work”).

225. MODEL CORPORATE POLICY, *supra* note 128, at 1 (stating an electronic communications policy serves three purposes: protection of the company; prevention of losses, errors, and mistakes; and education of employees “to better-inform employees about not-well-understood risks that exist in an electronic environment”).

226. See *supra* Part III.B.2.

to require that employees report all smart-phone use on a weekly basis, which would allow employers to monitor smart-phone use and control it if necessary. The weekly reporting would also prevent the employer from being blindsided by a large overtime claim. However, even a well-written contract cannot entirely eliminate overtime claims.<sup>227</sup> As such, the contract should also focus on creating a practical recording system for smart-phone use, which would be important if litigation were to arise. The recording system may not eliminate the overtime claim, but it could help provide sufficient evidence to prove the proper amount of compensable time and save both the employer and employee time and money.

The preventative policies and procedures may not insulate an employer from liability, but the policies and procedures can serve as fundamental evidence in wage-and-hour claims, which are very fact intensive.<sup>228</sup> The smart phone may provide ample opportunity for employees to create frivolous claims, but many employees will have legitimate claims for compensable work. An employer with well-developed policies and procedures and an effective overtime recording system will be able to counter frivolous claims and avoid being surprised by legitimate claims. The more evidence the employer and employees can produce, the greater the likelihood of a fair result for both sides.

#### IV. CONCLUSION

The Supreme Court's broad definition of "work" theoretically allows many activities to qualify as compensable. This creates potential liability for employers who provide or allow non-exempt employees to use their smart phones for work-related duties outside of the office. While the FLSA was designed to ensure workers receive fair compensation and prevent employers from taking advantage of employees, the Court's interpretation went beyond these protections. Furthermore, the FLSA was written and the seminal cases interpreting the Act were decided at a

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227. Phillips, *supra* note 166, at 2652 ("The Congress that passed the FLSA clearly intended to protect against unfair and unreasonable agreements that did not meet the minimum requirements of the Act . . ."); see Perkins Coie, *supra* note 88, at 5 ("[Y]ou still may be liable for the overtime pay if you knew or had reason to know that the employee was working from home. Under the FLSA, you must pay employees overtime for any hours worked over 40 in a workweek, regardless of whether the employee works at the office or at home.").

228. Employers should remain aware of FLSA standards when contracting with employees because the fact-intensive inquiry may look into the equity of the contract. Bargaining power in employee-employer relationships tends to favor the employer. As such, there may be an agreement between the two parties, but it may not meet FLSA standards. The Supreme Court has determined that contracts cannot be used to "supersede the FLSA." Phillips, *supra* note 166, at 2652.

time when work usually had to be done on the production line, in a mine, or at least in the office. Neither the FLSA nor the Court envisioned the ease with which workers could work in the twenty-first century, especially the ease with which employees could accumulate substantial overtime hours from the comfort of their homes. As such, it is important to recognize the Court's emphasis on interpreting the FLSA through practical industrial realities. The reality of smart phones is that they can help workers be more productive and more connected with work, but at the same time they can be used to accumulate substantial amounts of overtime with little effort if the right policies and procedures are not in place to protect the employers.

Smart-phone inquiries will require an intense look at the facts to determine if the use qualifies as compensable work. For example, carrying a smart phone and giving it a quick glance to check for e-mails does not constitute compensable work, but writing an e-mail to a client, reviewing a document for a manager, or researching an issue for work probably constitute compensable work when done outside of the office. The *de minimis* doctrine, the Portal-to-Portal Act, and the on-call case law all provide ways for the courts to interpret potential smart-phone claims. These three limitations provide an analytical framework for courts to evaluate smart-phone claims and, hopefully, separate the legitimate claims from the frivolous ones. Employers can use these limitations to understand what may be important in wage-and-hour claims and to develop policies and procedures that can limit liability. Employers, however, will not be able to completely eliminate the potential for litigation on smart-phone claims.

The FLSA and courts maintain a focus on fair treatment of workers. This focus almost guarantees a claim will go to trial because a non-exempt employee will eventually have favorable facts that indicate the employee was not compensated for off-duty work. Employers cannot rely upon the judicial and congressional limitations or the practical realities of industry. Instead, employers must actively seek to eliminate the potential for liability by eliminating smart phones for non-exempt workers, setting strict guidelines on their use through written contracts, and creating an office culture that diminishes any pressure to perform overtime work. Even the best-planned policies cannot prevent a lawsuit, but they can serve as important evidence at trial and preempt some non-exempt employees from using their smart phones after work.