

After Hours Use of Communication Technology & Overtime Compensation

The prevalence of 24/7/365 communications technology necessitates guidelines for “off-duty” business related use by overtime eligible State employees. The Fair Labor Standards Act requirement that certain overtime “hours worked” be paid, creates issues of determining:

- (1) What time is compensable? and
- (2) How is overtime work to be recorded?

In addition, the employer’s obligation to pay must be balanced with the employee’s obligation to get approval for working overtime.

The State’s policy is to pay for all compensable overtime worked.

To limit overtime expenditures, a U.S. Dept. of Labor rule (29 CFR 785.13) requires:

“(I)t is the duty of management to exercise its control and see that work is not performed if it does not want it to be performed. It cannot sit back and accept the benefits without compensating for them. The mere promulgation of a rule against such work is not enough. Management has the power to enforce the rule and must make every effort to do so.”

The State must not permit work for which it will not pay. If overtime is not approved, do not perform the work. Counseling (and if necessary discipline) must be imposed to correct the behavior of employees who ignore prohibitions against off-duty work. Even when the prerequisites were not met (i.e., off-duty work is performed without approval or even contrary to instructions), overtime that was worked will be compensated.

What time is compensable?

Non-exempt employees should not check or respond to work electronic messages while off duty, unless agency management has issued clear orders requiring off-duty follow up (e.g., emergency responders). When contacted ask: “Does this communication require immediate action or should it wait until the next schedule shift?” Work that is necessary, time sensitive, and substantial will be compensated. Other communications are brief, merely informational, and plainly do not require an immediate response. Supervisors may use “delayed delivery” messaging.

Is the time de minimis? Not every response to a phone call or follow up on an email is compensable work activity. You may be checking messages for your own convenience or for trivial amounts of time (less than 10 minutes daily). On the other hand, a supervisor-directed official “call-back” assignment to immediately perform a substantial task includes authorization for overtime pay or anticipation of a work schedule adjustment.

Time spent “on call” (not at the duty station and “waiting to be engaged”) can effectively be used primarily for the employee’s own purposes. Simply requiring the employee to provide contact information, or to refrain from using alcohol, or to respond within a reasonable time is not overly controlled by or primarily for the employer’s business. On-call time is not compensable.

Recording unscheduled hours of work

Document (date, time, description) and report substantial, off-duty, remote access. You must follow the employing agency’s process for seeking overtime compensation (submission of overtime reports, entries on PeopleSoft Time and Labor, etc.). The employer is not liable if the employee fails to follow the reasonable, established process for recording and reporting off-duty work.

If you are not properly paid for overtime, file a civil service complaint following the procedure at Indiana Code 4-15-2.2-42.