Avoiding Liability for Off-the-Clock Work in the Brave New World of the Blackberry

Gregory F. Jacob

Technological advancements and flexible workplace arrangements have dramatically increased the risk that non-exempt employees with access to such technologies will engage in off-the-clock work. With lawsuits concerning technology-related off-the-clock work on the rise, and with more US Department of Labor wage and hour investigators on patrol, employers should be taking a hard look at their remote email and remote work access infrastructure and considering devising new remote work policies or revising old ones to minimize the risk of off-the-clock work.

Technological advances such as personal data assistants (PDAs), the Blackberry,® and remote online email access have increased worker productivity and made it easier for employers to implement flexible workplace arrangements, but they have also substantially increased the risk that non-exempt employees with access to such technologies will engage in off-the-clock work. Further increasing employer exposure, when non-exempt employees perform remote off-the-clock work from home close to the time that they begin or end their commute, the “continuous workday” doctrine may render their typically non-compensable commuting time part of the continuous workday and therefore compensable. The Ninth Circuit recently considered these issues in Rutti v. Lojack Corp., Inc., and issued a surprisingly pro-employer ruling.1 The US Department of Labor (DOL) did not participate in the case, however, and the DOL’s recent pronouncements regarding off-the-clock work in other venues suggest that the DOL will stake out a contrary position when it eventually weighs in. With an increasing number of lawsuits concerning technology-related off-the-clock work being filed, and with 250 additional wage and hour investigators now on patrol at the DOL,2 employers should be taking a hard look at their remote email and remote access infrastructure and considering devising new remote work policies or revising old ones to minimize the risk of off-the-clock work by non-exempt employees.

THE RULES FOR DETERMINING COMPENSABLE WORK

The minimum wage and overtime requirements of the Fair Labor Standards Act (FLSA) impose in tandem a de facto requirement that employees must be paid for all hours worked.3 Because the FLSA does not include a definition of “work,” the courts have filled the gap. In Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123, the Supreme Court adopted a broad definition of work, holding that work includes all “physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business.”4 A subsequent decision clarified that exertion is not necessary for an employee’s task to constitute work, since “an employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for something to happen.”5 The Court applied this broad definition in Anderson v. Mt. Clemens Pottery Co. to require that employees be compensated for the time they spent walking to their work stations from time clocks at the factory entrance where they punched in.6
Had the matter of compensability been left there, the Supreme Court’s sweeping definition of work would provide an expansive but relatively clear bright-line rule that would make it easy to determine which tasks employees must be compensated for performing: that is, virtually every task authorized by and for the benefit of the employer. Three doctrines, however, have substantially muddied the waters:

- First, Congress almost immediately repudiated the result in *Mt. Clemens* by enacting the Portal-to-Portal Act of 1947. The Portal-to-Portal Act left the Supreme Court’s broad definition of work intact, but it expressly excepted from FLSA coverage “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,” as well as “activities which are preliminary or postliminary to said principal activity or activities, which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.” The Supreme Court has held that the term “principal activity,” which effectively demarcates the beginning and end points of an employee’s compensable shift under the Portal-to-Portal Act, includes tasks outside the designated work shift that are “integral and indispensable” to the employee’s performance of the principal activities.

- Second, the *Mt. Clemens* decision itself created the “*de minimis* rule,” which holds that compensable working time “must be computed in light of the realities of the industrial world,” that “[w]hen the matter in issue concerns only a few seconds or minutes of work beyond the scheduled working hours, such trifles may be disregarded,” and that “[i]t is only when an employee is required to give up a substantial measure of his time and effort that compensable working time is involved.” *Mt. Clemens* noted that “the *de minimis* rule can doubtless be applied to much of the walking time involved in this case,” but it left it to the lower courts to work out just what the rule meant and how it should be applied across the variety of factual circumstances that arise in the working world.

- Third, some courts have held that an employee is “employed” within the meaning of the FLSA, and thus entitled to compensation, only if the employer has actual or constructive knowledge that the employee is working. According to these decisions, “where an employer has no knowledge that an employee is engaging in overtime work and that employee fails to notify the employer or deliberately prevents the employer from acquiring knowledge of the overtime work,” the employer is not required to pay the employee for overtime hours. This doctrine has not been enthusiastically embraced by the DOL or by the majority of courts, and is typically applied only where it would be manifestly unfair to hold an employer responsible for failing to properly compensate an employee. The DOL’s interpretive regulations, for example, provide that “work not requested but suffered or permitted is work time.” Furthermore, several courts have cautioned that all the time an employee spends working will be deemed compensable if the employer had the opportunity through reasonable diligence to acquire knowledge of the employee’s work, even if the employer did not in fact know the employee was working.
Each of these three doctrines ultimately benefits employers, as each serves to exempt from compensability time that otherwise meets the Supreme Court’s broad definition of work. As the Supreme Court noted when it endorsed the \textit{de minimis} rule in \textit{Mt. Clemens}, the doctrines recognize that the “realities of the industrial world,” combined with a basic sense of fairness, require that there be some play in the joints of the compensability rules. Like any rule intended to instantiate such an amorphous concept as fairness, however, the doctrines use vague, undefined, and perhaps undefinable terms such as “principal activity,” “postliminary activity,” “trifles,” “a few minutes,” “a substantial measure of … time,” and “reasonable diligence.” The doctrines have thus cumulatively considerably muddied the compensability waters, lulling some employers into a dangerous sense of complacency about off-the-clock work while giving rise to a host of difficult compensability-related litigation issues that only a labor and employment lawyer could love.

\textbf{THE REMAINING BRIGHT LINES ON COMPENSABLE TIME}

Despite the muddied waters, two important bright-line rules affecting compensable time remain. First, the DOL established the “continuous workday rule” through an interpretive regulation immediately after the Portal-to-Portal Act was passed, and it has subsequently been endorsed and applied by the Supreme Court.\textsuperscript{16} The continuous workday rule holds that employees must be compensated for all activities performed within the regular workday. In effect, this means that such time must be compensated in a block, beginning when an employee’s first principal activity is initiated and ending when the last principal activity is completed. Within this block the Portal-to-Portal Act has no application, and thus does not operate to exclude from compensability time that employees spend walking, traveling, or waiting between performing their principal activities. Once the continuous workday has begun, it ends only when an employee is completely relieved from duty for a period of time long enough for the employee to use the time effectively for his or her own purposes (generally, 30 minutes or more).\textsuperscript{17} If an employee is provided a qualifying break period, a new continuous workday period will begin when the employee next performs a principal activity.

Second, the time employees spend commuting from their home to the location at which they perform their first principal activity, and from the location at which they perform their last principal activity to their home, is categorically excluded from compensability (for purposes of federal law) by the Portal-to-Portal Act, as long as the employer does not require the employee to engage in an abnormally long commute or to perform other work during the commute.\textsuperscript{18} Congress reinforced this point in 1996 by enacting the Employee Commuting Flexibility Act, which clarifies that the use of an employer-owned vehicle during a commute does not, in and of itself, render the commute compensable.\textsuperscript{19} The continuous workday rule still applies to travel time, however, and requires compensation for driving and other travel that employees engage in between the performance of their first and last principal activities.

\textbf{TECHNOLOGY AND OFF-THE-CLOCK WORK}

The most common off-the-clock work issues that have arisen as a result of recent technological advances are:

1. Remote communications engaged in by non-exempt employees\textsuperscript{20} via Blackberry, cell phone, PDA, or online email access;
2. Remote work performed by non-exempt employees on laptops, personal computers, or PDAs, sometimes by dialing in or otherwise connecting to the employer’s computer servers through phone lines or the Internet, and frequently triggered by a remote communication from the employer informing the employee that certain work needs to be done; and
3. Time at the workplace that non-exempt employees spend waiting before or after their first or last principal activity for computers or other electronic systems to boot up or shut down.
There can be no question that all of these activities constitute work under the FLSA as it has been defined by the Supreme Court. Thus, employer liability for unrecorded time non-exempt employees spend engaging in these activities hinges on whether, and under what circumstances, the three compensability exemption doctrines apply.

If an employee regularly and predictably spends seven minutes a day waiting for a computer to boot up so that he or she can log in to the timekeeping system, does that amount of time—more than 30 minutes each week—qualify for exclusion as *de minimis*? Does sending or receiving email remotely after working hours qualify as a preliminary or postliminary activity that is excluded from compensability by the Portal-to-Portal Act? If the employer did not authorize and further did not have actual knowledge of an employee’s remote after hours emailing activities, can the employer avoid being required to compensate the employee on that basis? These questions are difficult, and clear answers are elusive under many real-world working scenarios. The Ninth Circuit’s recent decision in *Rutti*, however, read in conjunction with various DOL interpretive pronouncements, offers useful guidance employers can and should apply to avoid the risks of expensive, fact-intensive litigation and ultimate legal liability.

**THE NINTH CIRCUIT’S *RUTTI* DECISION**

In *Rutti*, the Ninth Circuit examined the compensability of time that non-exempt technicians employed by Lojack, Inc. spend at home before and after their assigned work shifts sending and receiving electronic data transmissions. The court also examined whether these mandatory remote off-shift work activities rendered the technicians’ commuting time from home to their first service job and from their last service job back to their home part of the continuous workday and therefore compensable. The three-judge panel, composed of a Reagan, a Clinton, and a George W. Bush appointee,21 unanimously ruled that the pre-shift data transmissions were not compensable under the FLSA, both because they were preliminary activities excluded from compensability by the Portal-to-Portal Act and because of the *de minimis* rule.22 A majority of the panel held, however, that the compensability of the post-shift data transmissions was too fact-dependent to be decided on a motion for summary judgment. One of the panel judge would have ruled that the technicians’ post-shift transmissions were non-compensable as a matter of law.

As recounted by the court, Lojack employs more than 450 technicians nationwide to install and repair vehicle recovery systems. These installations and repairs are virtually always performed at client locations, and Lojack therefore provides technicians company-owned vehicles to travel from job site to job site. The technicians are paid on an hourly basis, beginning with their arrival at the first job site, and ending with the time that they leave the last job site.

Each morning, Lojack technicians are required to log into hand-held computer devices provided by Lojack to download a list of their jobs for the day. The technicians are required to prioritize the jobs and to map out a route to the day’s various assignments. At least some technicians also fill out paperwork before leaving home each morning, but the court stated that the record showed such paperwork was fairly minor, taking no more than one minute per day. Technicians were not compensated for any of this pre-shift work.

During their work shifts, technicians are required to record information about their installations on a portable data terminal (PDT). Because the recording occurs during the work shift, technicians are compensated for this time. At some point after their shift, however, technicians are required to transmit the assembled data back to Lojack from home using a modem that Lojack provides. Technicians are not compensated for this time. To accomplish the transmission, technicians must connect their PDT
to the Lojack-provided modem, scroll down a menu on the PDT, and select the “transmit” option to initiate an upload. Technicians cannot always perform the required transmission immediately after returning home because Lojack’s corporate computer system is unable to receive transmissions ten minutes before and ten minutes after each hour. Moreover, transmissions sometimes fail and technicians must check back to ensure the transmission has been completed successfully. Multiple transmission attempts may be required, and if two or more failures occur, technicians are further required to document the failure and the apparent reason for the problem. Transmissions are not required to be completed at any particular time; transmission any time before 7:00 a.m. will do. Moreover, technicians can set their PDTs to automatically transmit data overnight, in which case transmission problems rarely if ever occur.

The court unanimously ruled that the technicians’ pre-shift log-in, downloading, prioritizing, and route mapping time was not compensable. The court held that all of these activities relate to the technicians’ commute, and that because commuting time is generally non-compensable under the FLSA, such commute-related activities are also non-compensable. Because the court’s ruling is based on the view that such activities are categorically non-compensable, the court’s opinion does not mention how long it takes technicians to perform them, nor does it analyze whether or how the de minimis rule would apply to such activities.

Having categorically excluded these pre-shift activities from compensability, the court separately analyzed the time some technicians spend filling out paperwork each morning before they leave for their first job. The court held that a mere minute or so of paperwork clearly qualifies for de minimis treatment, and that this time was therefore also non-compensable.

The court found the compensability of the required post-shift transmission time more difficult to resolve. The post-shift data transmissions clearly were not related to commuting, and the court determined that they were in fact part of the regular work of the technicians, performed in the ordinary course of business and primarily for the benefit of the employer. The court did not definitively rule out the possibility that the post-shift transmissions could qualify as postliminary activities, but its finding that the transmissions were necessary to the business and occurred in the ordinary course of business render it difficult to argue that they were not integral and indispensable to the technicians’ principal activities, which means that they thus themselves qualify as principal activities under governing Supreme Court doctrine. The court went on to hold that while the record indicated the transmissions took no more than five to ten minutes each night, this fact did not automatically qualify the time for de minimis treatment, as there is no bright-line rule for determining what amount of daily off-the-clock work time qualifies as de minimis. The court remanded the issue for the lower court to analyze application of the de minimis rule to the specific facts of the case under the multi-factor test established by the Ninth Circuit’s decision in Lindow v. United States, which requires examination not only of the raw amount of time employees spend performing off-the-clock work, but also of the practical administrative difficulty the employer would face in attempting to record the time, the regularity of the work, and the aggregate amount of time employees spend performing the activity.23

Finally, the court rejected Rutti’s argument that his pre-shift and post-shift work rendered his commute to his first job site and from his last job site compensable. The court held that its determination that none of Rutti’s pre-shift work was compensable foreclosed any possibility that those activities could initiate the continuous workday, and the normal rule excluding an employee’s commute to work therefore applied. The court further held that because technicians could perform required post-shift data transmissions at any time during the evening, they could not render the technicians’ commute
home compensable. According to the court, the technicians’ continuous workday ended when they completed their last installation job, since at that point they were completely relieved of duty and became free to do whatever they wanted with the rest of their day, save only the requirement that at some point before 7:00 a.m. the post-shift data transmission be completed. Because of this flexibility, the transmission time could not form part of the technicians’ continuous workday, even if it was ultimately determined to be compensable.

LESSONS FROM RUTTI, AND REASONS TO QUESTION IT

Rutti’s most significant ruling for employers is the relationship it establishes between remote off-the-clock work and commuting time. Adding commuting time to an employer’s potential liability for remote off-the-clock work can greatly multiply damages, giving plaintiffs significant additional leverage in litigation. The court’s separate holdings concerning the compensability of the technicians’ pre-shift and post-shift commutes are both quite helpful to employers.

First, the court’s holding that work qualifying for de minimis treatment does not initiate the continuous workday, even if it is a compensable principal activity, means that the occasional email sent or received by an employee immediately before his or her commute will not render the employee’s commuting time compensable. Second, the court’s holding that the required post-shift data transmissions did not render the technicians’ homeward commute compensable means that remote emails and other remote work performed by employees after their shift is over will not extend the back end of the continuous workday, even if the employee performs remote work immediately upon returning home, as long as the employer did not actually require the employee to perform the work at that particular time. Since most remote work performed between shifts is not required to be performed at a particular time, this ruling effectively shields most commuting time from being considered compensable in remote off-the-clock work cases.

Several points of caution concerning Rutti’s commuting holdings are warranted, however. First, the DOL has expressly staked out the position that the de minimis rule and the continuous workday rule have nothing to do with one another.24 According to the DOL, the continuous workday runs from the employee’s first principal activity to the employee’s last principal activity, regardless of whether those activities are de minimis, and that the de minimis rule merely applies to exclude a few stray minutes of off-the-clock work from compensability. The DOL did not participate in Rutti, and the court did not provide a great deal of analysis in support of its ruling that de minimis activities do not start the continuous workday. It is unclear whether the DOL’s more expansive position will prevail in courts outside the Ninth Circuit once DOL finds occasion to weigh in.

Second, while Rutti held that post-shift remote work not required to be performed at a particular time does not render the commute home compensable, that holding may not apply where employees perform pre-shift remote work immediately before commuting to their place of employment, regardless of whether the employer specifically required the employees to perform the pre-shift work at that particular time. The court ruled that the technicians’ post-shift commute was not compensable because the technicians were completely relieved of duty at the end of their last installation job and their time was returned to their own control, thus ending the continuous workday. This rationale does not squarely apply to remote work performed pre-shift, however, because employees may not be completely relieved of duty after the work is performed for a sufficient amount of time to qualify as a break under the continuous workday rule. A 15-minute break, for example, generally is not considered to be sufficient time for an employee to meaningfully use for his or her own purposes. Thus, remote work performed immediately before a 15-minute commute to the place of employment could arguably bring the commute within the continuous workday.
Third, Rutti’s holding that the pre-shift time Lojack technicians were required to spend logging in to hand-held computer devices, downloading their assignments for the day, prioritizing the assignments, and mapping out their routes between assignments was all commute-related rather than work-related is questionable. Under the continuous workday rule, all of the time technicians spend driving between work locations is considered to be for the employer’s benefit and is fully compensable. If a technician performs ten installations in a day, he or she will have 11 total driving legs, nine of which will be between jobs, and thus compensable, and only two of which will be between a job and home, and thus non-compensable commuting time. The vast majority of the time technicians spend downloading, prioritizing, and mapping their routes is thus not primarily related to their commutes, but rather is primarily related to their work for Lojack. Moreover, the entire exercise of downloading assignments at home arguably primarily benefits the employer, since the alternative—having technicians report to the office to receive their assignment list, and then drive to their first assignment from there—would render all 11 driving legs to and from assignments compensable, as only the drive to and from the main office would be considered noncompensable commuting time. This is not to say that the Rutti court should have found that the technicians’ pre-shift work time was actually compensable—the time might properly have been excluded from compensability either as a preliminary activity or under the de minimis rule—but the rationale the court actually applied is difficult to square with established compensability doctrines.

The other significant lesson employers should take away from Rutti is that while the de minimis rule is a valuable defense for employers to raise during litigation, it is generally very fact-sensitive and cannot always be relied on to stave off litigation in the first instance. One or two minutes of off-the-clock work a day can safely be said (absent extenuating circumstances) to qualify for de minimis treatment on the strength of Mt. Clemens, and the Rutti court accordingly had no problem holding that the approximately one minute a day that some technicians spent filling out paperwork at home was not compensable. Once larger amounts of daily time become involved, however, the authorities split. The Ninth Circuit noted in Lindow that most courts have accepted up to ten minutes of work time per day as de minimis, but neither Lindow nor Rutti endorsed a bright line rule of even five minutes per day. Several courts have aggregated time across a period of a week or more, and some courts have even suggested that aggregation of time across the claims of multiple plaintiffs is appropriate. Thus, while the de minimis rule is a tool employers should always robustly invoke once litigation arises, employers wishing to avoid future litigation should probably take a relatively conservative approach in relying on the de minimis rule as a justification for failing to compensate employees for time they actually spend working.

ADVICE FOR EMPLOYERS
Providing non-exempt employees Blackberry® devices, PDAs, remote email access, or even cell phones suggests the employer expects remote off-shift work will at least occasionally need to be performed, and, in the absence of a carefully crafted off-shift compensation policy, is an invitation to potential litigation. Employers should think hard about whether the productivity gains from such devices are sufficient to offset the risk of an eventual lawsuit. Employers who need non-exempt employees to use such devices during the workday for logistical reasons may want to consider whether it is feasible to require employees to pick up the devices at the beginning of the workday and to drop them off at the end, or whether the devices’ remote access capabilities can be switched off during off-shift hours.

Employers who do choose to provide non-exempt employees remote email and remote work capabilities can minimize their litigation risk by adopting clear policies concerning when remote work is authorized to be performed and how and when off-shift work time should be recorded.
Infrequent non-substantive emails and phone calls that merely schedule appointments or meetings can probably fairly be regarded as preliminary or postliminary activities that are excluded from compensability under the Portal-to-Portal Act, unless scheduling appointments and meetings is one of the employee's core responsibilities. All other remote email and remote work activities, however, are presumptively compensable unless they qualify for *de minimis* treatment or unless the employer can show it did not have actual or constructive knowledge that the work was performed and could not have acquired such knowledge through the exercise of reasonable diligence. Given that virtually every instance of remote electronic work is typically recorded in some fashion by an employer's electronic systems, employers should not bank on being able to use the “actual or constructive knowledge” exclusion, even for unauthorized work, unless such work was infrequent and was never reported by the employee. Once in litigation, of course, the “actual or constructive knowledge” exclusion is a valuable defense that ought to be raised where appropriate, and an employer will often have a strong case that it did nothing wrong in failing to compensate an employee for work that the employee was not authorized to perform and never reported performing. The “actual or constructive knowledge” standard typically requires a fact-intensive inquiry, however, and the doctrine thus provides a poor foundation to prevent lawsuits from being filed in the first place.

The main choice an employer must make in establishing a legally defensible compensation policy for remote off-shift work, therefore, is whether to establish a threshold for daily or weekly amounts of off-shift work time below which the employer will consider the off-shift work to be *de minimis* and thus non-compensable. The safest rule, of course, is to tell non-exempt employees to record all off-shift remote work time and to compensate them for that time accordingly. Employers wishing to maintain an exclusion for *de minimis* amounts of remote off-shift work time have hard choices to make with respect to litigation risk tradeoffs, as the courts and the DOL have not settled on any specific number of raw minutes that qualifies for *de minimis* treatment, or even a settled period of time (days, weeks) across which off-shift work minutes should be aggregated. Considering the range of current authorities, it can be said that employers are absolutely safe in excluding up to five minutes of remote off-shift work time each week as *de minimis*, and are probably on very safe footing in excluding up to ten minutes each week. Employers even have several authorities they can cite to for the proposition that five or even ten minutes a day of off-shift work qualifies for *de minimis* treatment, but countervailing authorities using longer periods of aggregation, or holding that whether five minutes of off-shift work per day qualifies as *de minimis* is properly a question for a jury, render use of these standards in a written compensability policy risky.

In choosing the appropriate inflection point at which to set a *de minimis* cut off for off-shift work, employers should note that courts generally consider that a greater number of minutes can be treated as *de minimis* where off-shift work occurs irregularly or is not as a practical matter easily susceptible to being accurately recorded. On the other hand, when off-shift work occurs regularly and can be recorded accurately, this generally counsels in favor of choosing a lower *de minimis* threshold. Remote email and other similar remote work, of course, is typically quite irregular and difficult to predict. Moreover, while the raw number of emails sent or received by an employee in a given period of time can usually be ascertained by examining the employer’s electronic records, the amount of time the employee actually spent reading, thinking about, and composing those emails is typically very difficult for an employer to monitor and record with any degree of certainty. Thus, courts may be apt to apply a higher *de minimis* threshold in remote off-shift email cases.

Whatever number of minutes and whatever aggregation period an employer ultimately selects in setting a compensability threshold (if any), it is always critical that the remote work policy be clearly written, widely disseminated, and applied in an even-handed fashion. A clear policy that is applied
with regularity will vastly improve an employer’s odds of nipping any litigation that should arise in
the bud through an early motion for summary judgment. Given the increasingly hostile litigation
environment employers face across the board in wage and hour matters, remote off-shift email and
other remote work is unquestionably an area where an ounce of prevention is worth a pound of
cure.

Gregory F. Jacob is a partner at Winston & Strawn LLP who practices labor and employment law. He
Jacob may be contacted at gjacob@winston.com.

This information or any portion thereof may not be copied or disseminated in any form or by any
means or downloaded or stored in an electronic database or retrieval system without the express
written consent of the American Bar Association.

NOTES

Endnotes
1 __ F.3d __, No. 07-56599 (9th Cir, Mar. 2, 2010).
2 Department of Labor News Release, Statement of Secretary of Labor Hilda Solis, Mar. 25,
2009.
4 321 U.S. 590, 598 (1944).
6 328 U.S. 680, 691 (1946).
7 This article only discusses compensability exceptions of general applicability. There are also
a handful of specific compensability exceptions that employers can rely on under particular
factual circumstances. For example, Section 3(o) of the FLSA, which was enacted just two
years after the Portal-to-Portal Act, allows an employer to exclude clothes-changing time
from compensability where such an exclusion is provided for either by the express terms of
a collective bargaining agreement or by a custom or practice established under a collective
(2005).
10 328 U.S. at 692.
11 __.
12 See, e.g., Newton v. City of Henderson, 47 F.3d 746 (9th Cir. 1995).
14 29 C.F.R. § 785.11.
15 See, e.g., Reich v. Dept. of Conservation and Natural Resources, 28 F.3d 1076, 1082 (11th
Cir. 1994).
16 29 C.F.R. 790.6-790.7; Alvarez, 546 U.S. at 29, 37.
17 29 C.F.R. 785.18 (rest breaks of 20 minutes or less generally do not qualify), 29 C.F.R.
785.19 (meal breaks of 30 minutes or more generally do qualify).
18 29 U.S.C. § 254; 29 C.F.R. 785.35. Where an employer requires an employee to engage in
a longer-than-normal commute for the benefit of the employer, the employer is required to
compensate the employee for extra commuting time, but can exclude whatever amount of
time the employee would normally have spent commuting. 29 C.F.R. 785.37.
To qualify for exempt status, employees generally must be paid on a salary basis, meaning they must be paid a salary that constitutes compensation for however many hours they work in a week, whether few or many. For this reason, off-the-clock work issues generally are not of concern with respect to employees who are properly classified as exempt.

The judges were Consuelo M. Callahan (George W. Bush appointee), Barry G. Silverman (Clinton appointee), and Cynthia Holcomb Hall (Reagan appointee).

Judge Silverman dissented in part on the separate issue of the compensability of the technicians’ commuting time under California law.

Tum v. Barber Foods, Inc., Supplementary Brief for the Secretary of Labor as Amicus Curiae Supporting Petition for Panel Rehearing and Rehearing En Banc Nos. 02-1679, 02-1739 (1st Cir. Sep. 13, 2003) (“We respectfully submit that the concept of de minimis is not relevant in determining the beginning and end of the “workday.”).

See, e.g., Addison v. Huron Stevedoring Corp., 204 F.2d 88, 95 (2d Cir. 1953) (suggesting aggregation across a period of a year).

Reich v. Monfort, Inc., 144 F.3d 1329, 1334 (“It is also appropriate to consider an aggregate based on the total number of workers.”).

Employers that establish policies prohibiting non-exempt employees from performing unauthorized off-shift remote work should nonetheless make it clear that any significant off-shift work time should be recorded and will be paid for. Unauthorized work should always be treated as a disciplinary issue rather than as a compensability issue.