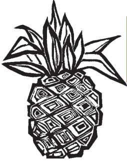

Human Resources

by Bradley T. Adler and Martin B. Heller

Why failing to pay for computer "booting up" time might transport you into a costly lawsuit

*Another great article from The Rooms Chronicle®, the #1 journal for hotel rooms management! ***Important notice: This article may not be reproduced without permission of the publisher or the author.*** College of Hospitality and Tourism Management, Niagara University, P.O. Box 2036, Niagara University, NY 14109-2036. Phone: 866-Read TRC. E-mail: editor@roomschronicle.com*

Notice: The ideas, opinions, recommendations, and interpretations presented herein are those of the author(s). The College of Hospitality and Tourism Management, Niagara University/The Rooms Chronicle® assume no responsibility for the validity of claims in items reported.

Let's start with a fairly common scenario. An hourly employee arrives for work to start their shift. They sit down at their desk and turn on their computer. After about 5 minutes, the computer completes its booting up process, and the employee signs in. Once the employee signs in and the computer has accepted the employee's password, his employer considers his workday to have officially started and he begins to receive pay for his time.

Now, ask yourself what is wrong with this picture? If you said nothing, you might be right, BUT, believe it or not, this exact scenario has led to several millions of dollars in settlements over the last few years. This article provides a crash course on the legal issues associated with booting up time, and we also provide some helpful hints to keep you from becoming the next Wall Street Journal headline.

Is the work actually "work"?

Determining exactly what is "work" under the Fair Labor Standards Act (FLSA) is not easy. The Supreme Court says "work" includes "physical or mental exertion controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." Congress has provided input by passing the "Portal to Portal" Act, which added some exemptions to the definition of work, including activities that are preliminary or postliminary to the principal work activities. Finally, courts also find that work includes principal activities and activities that are integral and indispensible to principal activities.

Confused? So are the courts. Sometimes changing into and out of clothes is compensable, sometimes it isn't. But, activities like waiting at a time clock and walking to a time clock are not compensable, if they occur before the beginning of a work day, because they are preliminary to the first principal activity.

The de minimis exception

In case the definition of "work" isn't confusing enough, courts sometimes find that time spent on various activities is not compensable under a "de minimis" exception. According to the exception, "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" for purposes of calculating hours worked.

Typically, the de minimis exception means 10 minutes or less per day. However, courts have held that even short periods of time (as little as 3 minutes) are compensable if the time easily could be calculated by the employer. Unfortunately, this exception is inconsistently applied, leaving employers who rely on its application in an uncertain, vulnerable state.

How does "booting up" time fit into the definition of work?

This leads to the real question: Is booting up a computer and waiting to log in a necessary, indispensible activity, and a part of a continuous work day? Unfortunately, there are no court decisions squarely answering this question yet, and most employers are not willing to test the waters.

It appears anecdotally that the United States Department of Labor has taken the position that turning on your computer is a necessary and indispensible part of an employee's work day that is related to the principal activities of performing actual work on the computer. Therefore, the Department takes the position that turning on your computer is the beginning of the continuous workday, and is compensable.

If courts agree with this position, any employee who "clocks in" on a computer is incrementally missing compensable time every day from the second they turn on the computer until they actually log in using the time clock software. Unfortunately, until employers receive guidance from the courts, there is real uncertainty in this arena. Of course, while there are arguments in defense, plaintiffs will continue to argue that booting up time is compensable.

Are you worried about a failure to pay an employee an extra 8 minutes?

Many of you are probably thinking, "no big deal . . . the company may owe one employee 8 extra minutes per day, damages must be small, probably a maximum of $400 per year." When calculating damages, however, remember that the FLSA provides for actual damages (amount of pay that the employee is owed but was not paid), looking back up to three years. This number is then doubled in most circumstances (called "liquidated damages") and plaintiffs also may recover their attorney's fees.

Then comes the real fear: "collective actions." Under the FLSA, it is fairly easy for plaintiffs to achieve "conditional class certification," meaning a single plaintiff claim may quickly explode into a lawsuit by all similarly situated current and former employees. This means that a case involving one employee and $400 of unpaid wages can turn into a case with 500 employees and significant and perhaps even catastrophic damages for smaller companies.

In a potential sign of the times, courts already have granted class certification in booting up cases and the settlement values for some of these cases are astonishing. For example, T-Mobile settled a booting up case for $4.7 million dollars. Cingular Wireless paid over $5 million dollars for booting-up claims and Humana settled a similar claim for about $1 million dollars. The moral of the story is *fear the collective action*.

Avoid it rather than fight it

Now that we have scared you a little, here are some tips that will help you avoid a costly court battle:

1) Knowledge is key: It is almost impossible to successfully defend a lawsuit alleging unlawful payment practices if you do not have a good grasp on the manner in which you pay your employees and why. Review your clocking in and out mechanisms and how your time clocks are controlled. Check and see if your company uses paper sign-in sheets, or if there is any way to record when an employee arrives at work. During this process, consider whether any time is "lost" while employees are working.

2) Don't let your computers slow you down: If your time clock is controlled by logging in or out of a computer, figure out what applications run on each computer and keep track of the time it takes for the computer to reach the log-in menu. If your technology is dated, update it. A slow computer means potential FLSA liability and it also means wasted employee efficiency. Typically, updating technology is cheaper than you think, and the improved efficiency will pay for itself fairly quickly.

3) Implement good policies, pay any unauthorized time and punish violators: The FLSA does not require intent, which means any violation leads to liability. Having said that, policies banning certain activities can be invaluable to defending and avoiding a lawsuit. Make sure you have a "Work Hours" policy that bans working before clocking in, working after clocking out, and working off the clock (such as on lunch breaks).

These policies set the tone for your employees, and they may help you defeat a collective action or lower the exposure in such a proceeding. Further, make sure you have a policy that provides that an employee should immediately report to the company if he is asked by a manager to work "off the clock" or if he is not paid all hours worked. If the employee works the hours (even if unauthorized or "off the clock"), you must pay the employee as if the work was permitted, and then discipline the employee for violating your "Work Hours" policy.

4) Be flexible: There is no single solution for every FLSA issue. The easiest solution to a "booting up" problem is to change your time reporting system so that it captures the start of a day when an employee turns on his computer, and reflects the end of the day when the work is done, not when the computer turns off. However, if this is not feasible, consider adding small time increments back into each day. This makes it difficult for an employee to argue that he lost time. If none of these options work, be open to other alternatives, and remember that the cost of flexibility is cheaper than the cost of a lawsuit. Remember to consider all of the options you think are available, and contact your employment attorney if you have any questions. ✧

(Bradley T. Adler is a Partner in the Labor Law and Employment Litigation Section of Freeman Mathis & Gary, LLP. He has represented public and private sector employers in resolving labor and employment related issues, including employment discrimination claims, wage and hour claims, family and medical leave claims and disputes regarding non-compete, non-solicitation and non-disclosure agreements. He can be reached at badler@fmglaw.com. Martin B. Heller is an associate in the Labor Law and Employment Litigation Section of Freeman Mathis & Gary, LLP. He represents public and private sector employers in all aspects of employment litigation, including wage and hour claims, employment discrimination claims, and claims involving the Office of Federal Contract Compliance Programs. He can be reached at mheller@fmglaw.com.

This information is general and educational and is not legal advice. This article originally appeared in the HospitalityLawyer.com Labor & Employment Newsletter, July 2011 and is reprinted with permission.)