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## ARTICLE

### THE UBIQUITOUS BLACKBERRY: THE NEW OVERTIME LIABILITY

*Maria L. Barbu*<sup>†</sup>

#### I. INTRODUCTION

Smartphone use,<sup>1</sup> and in particular BlackBerry use, “has become so commonplace that it is second nature.”<sup>2</sup> Employees are checking their smartphones before they fall asleep, immediately when they wake up, while watching a baseball game with the family, while on their way to work, or while having coffee at the local coffee shop. With technology now allowing connectivity twenty-four hours a day, more and more employees are using smartphones to answer work related phone calls and e-mails after work. This phenomenon has led to a recent wave of wage-and-hour litigation,<sup>3</sup> with employees claiming overtime compensation for all the hours they have

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1. “[A] smartphone is a device that lets [the users] make telephone calls, but also adds in features that [the user] might find on a personal digital assistant or a computer—such as the ability to send and receive e-mail and edit Office documents.” Liane Cassavoy, *What Makes a Smartphone Smart?*, ABOUT.COM, [http://smartphones.about.com/od/smartphonebasics/a/what\\_is\\_smart.htm](http://smartphones.about.com/od/smartphonebasics/a/what_is_smart.htm) (last visited Nov. 3, 2010); *see generally* PEI ZHENG & LIONEL NI, SMART PHONE & NEXT GENERATION MOBILE COMPUTING 2-6 (2006) (describing what constitutes a smartphone). The BlackBerry, developed by the Canadian company Research in Motion (RIM), and the Apple iPhone are two of the most common smartphones currently in use in the United States. *See* Prince McLean, *Canalys: iPhone Outsold All Windows Mobile Phones in Q2 2009*, APPLEINSIDER (Aug. 21, 2009), [http://www.appleinsider.com/articles/09/08/21/canalys\\_iphone\\_outsold\\_all\\_windows\\_mobile\\_phones\\_in\\_q2\\_2009.html](http://www.appleinsider.com/articles/09/08/21/canalys_iphone_outsold_all_windows_mobile_phones_in_q2_2009.html) (describing how RIM is holding a commanding fifty-two percent share of U.S. smartphones, while Apple’s iPhone has grabbed a twenty-three percent share). According to a recent estimate, one billion smartphones will be shipped by 2012. *See* Mika Raento, Antti Oulasvirta & Nathan Eagle, *Smartphones: An Emerging Tool for Social Scientists*, 37 SOC. METHODS RES. 426, 427 (2009).

2. Jeffrey M. Schlossberg & Kimberly B. Malerba, *Tech-Tock: Are Employees Who Check Devices Off Hours Entitled to Overtime Pay?*, N.Y.L.J., May 21, 2007, at 9.

3. *See infra* Part II.

spent answering phone calls or checking e-mails on their smartphones while off-the-clock.

There is a large appetite for smartphones in the corporate world.<sup>4</sup> In the United States, “sixteen million corporate-liable smartphones are in use today out of a total workforce of 155 million people.”<sup>5</sup> Companies find that employee use of these devices supports greater productivity, efficiency, and flexibility.<sup>6</sup> Evidence suggests that an increasing number of employers are not only amenable to the employees’ use of smartphones, but have come to expect that their employees use these devices after-hours.<sup>7</sup> Furthermore,

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4. Tim Weingarten, *Lowering the Corporate Threshold for Smartphones*, VISAGE MOBILE (Sept. 15, 2009, 8:17 AM), <http://www.visagemobile.com/news/blogs/833/lowering-the-corporate-threshold-for-smartphones/>; see also ALASTAIR SWEENEY, BLACKBERRY PLANET: THE STORY OF RESEARCH IN MOTION AND THE LITTLE DEVICE THAT TOOK THE WORLD BY STORM 2 (2009) (“An astounding 85 percent of public corporations are supplying staff with the devices, and . . . [t]oday, more than 500,000 devices are installed in every department of the U.S. government and throughout the US Senate and House of Representatives.”).

5. Weingarten, *supra* note 4 (indicating that a report from Credit Suisse has predicted an “acceleration of smartphone market growth”).

6. See Lei-da Chen & Cynthia L. Corritore, *A Theoretical Model of Nomadic Culture: Assumptions, Values, Artifacts, and the Impact on Employee Job Satisfaction*, 22 COMM’NS ASS’N FOR INFO. SYS. 235, 236 (2008) (describing the benefits of remote computing as “improved productivity, removal of temporal and spatial constraints, improved access to key decision-makers, enhanced access to rich business data, and freedom.”); Catherine A. Middleton, *Illusions of Balance and Control in an Always-On Environment: A Case Study of BlackBerry Users*, 21 CONTINUUM: J. MEDIA & CULTURAL STUDIES 165, 167 (2007) (describing the BlackBerry as a “tool of efficiency, providing control over users’ communication needs from any location, and enabling responsiveness and accessibility at all times.”); Gayle Porter, *Implications of Employer-Supplied Connectivity Devices*, WORLDDATWORK 7 (2009), <http://www.worldatwork.org/waw/adimLink?id=32005> (noting that companies find that employer-supplied connectivity devices allow flexibility, as employees “can be reached and have the tools to step into work mode at any time should the need arise.”). *But see* Catherine A. Middleton & Wendy Cukier, *Is Mobile Email Functional or Dysfunctional? Two Perspectives on Mobile Email Usage*, 15 EURO. J. INFO. SYS. 252, 254-55 (2006) (indicating that in the name of efficiency, which is a functional attribute, BlackBerry users carry out dysfunctional dangerous practices, such as emailing while driving).

7. See Porter, *supra* note 6, at 7. The research study also notes that in organizations that supply these devices to employees, “employees will be more likely to describe the culture as one that expects them to be accessible outside of traditional work hours.” *Id.* at 29; see also Melissa Mazmanian, Joanne Yates & Wanda Orlikowski, *Ubiquitous Email: Individual Experiences and Organizational Consequences of Blackberry Use*, 65 ACAD. MGMT. ANNUAL MEETING PROCEEDINGS (2006), available at [http://seit.mit.edu/Publications/BlackBerry\\_AoM.pdf](http://seit.mit.edu/Publications/BlackBerry_AoM.pdf) (indicating that while “[o]n the one hand, BlackBerry use allows for increased mobility, communication during ‘down time,’ and reduction of

while smartphones used to be supplied only to executives and managers within a company because of their high cost, this is not the case anymore.<sup>8</sup> Smartphones have become cheaper and companies are providing the devices to lower-level employees who are entitled to overtime compensation under the Federal Labor Standards Act (“FLSA”),<sup>9</sup> the federal statute regulating overtime compensation.

With smartphones becoming an inexpensive investment for companies, and with the recession adding pressure on employers, companies are trying to do the same amount of work with fewer people,<sup>10</sup> leading to more and more FLSA covered employees using BlackBerrys and other smartphones for off-the-clock work-related communication. This practice has created a number of current FLSA lawsuits in which employees are demanding pay for the overtime hours earned while tapping on their smartphones.<sup>11</sup>

This Article examines how smartphone overtime claims challenge the existing overtime case law, proposes a new framework for analyzing smartphone overtime claims, and advocates for ways in which smartphone litigation can be avoided. Part I provides an overview of the existing overtime case law regarding on-call time and time spent engaged in preliminary or postliminary work activities and explores the different standards used by courts in deciding what constitutes compensable time. Part II analyzes how off-the-clock smartphone use situations challenge the current overtime standards. Part III proposes a new framework that courts can use in properly assessing whether employees using smartphones off-the-clock are entitled to overtime compensation. Finally, Part IV examines

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moment-to-moment stress. On the other hand, expectations of responsiveness have intensified and become taken for granted.”).

8. See Dan Woods, *The End Of The BlackBerry Elite*, FORBES (Apr. 20, 2010), <http://www.forbes.com/2010/04/20/smartphone-mobile-iphone-technology-cio-network-blackberry.html>.

9. 29 U.S.C. §§ 201–219 (2006). For a detailed discussion of the FLSA, see *infra* Part I.

10. See Michael Sanserino, *Lawsuits Question After-Hours Demands of Email and Cellphones*, WALL ST. J., Aug. 10, 2009, at B1.

11. See *infra* Part II (discussing the current lawsuits). Before any of these recent lawsuits were filed, the media extensively discussed the potential liability of having employees use smartphones after hours. See, e.g., Tresa Baldas, *Overtime Suits May Ripen with BlackBerrys*, NAT. L. J., Apr. 28, 2008, at 6; Elizabeth Stull, *Employment Law: Wary of Wireless?*, DAILY RECORD, July 27, 2009, at 1, 7; *Beware of the Thorns in the BlackBerry Patch*, AM. MGMT. ASS’N (Sept. 17, 2008), <http://www.amanet.org/training/articles/Beware-of-the-Thorns-in-the-BlackBerry-Patch.aspx>; Daniel A. Schwartz, *The BlackBerry Issue: How PDAs Can Create Serious Wage and Overtime Issues*, CONN. EMP’T L. BLOG (Feb. 5, 2009), <http://www.ctemploymentlawblog.com/2009/02/articles/wage-and-hour/the-blackberry-issue-how-pdas-can-create-serious-wage-and-overtime-issues/>.

the different options that employees and employers have to avoid smartphone overtime lawsuits.

### I. FLSA AND THE HISTORY OF OVERTIME LAW

This Part provides an overview of the current overtime case law by examining the FLSA coverage to see which employees are able to sue for overtime, by looking at the definition of work provided by the FLSA, and finally by discussing two forms of overtime—on-call time and time spent performing a work activity that is preliminary or postliminary to an employee’s job.

#### A. FLSA Coverage: Who Can Sue for Overtime?

An analysis of wage liability in the case of after hours smartphone use needs to start with the identification of which employees are entitled to overtime compensation under the FLSA. Not all employees are covered under the FLSA overtime provision<sup>12</sup> or entitled to overtime compensation for “a workweek longer than forty hours.”<sup>13</sup> An employment relationship needs to exist,<sup>14</sup> meaning that to be covered, a worker must be an employee, defined as an “individual employed by an employer.”<sup>15</sup> To benefit from the

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12. See 29 U.S.C. § 213(a) (2006).

13. 29 U.S.C. § 207(a)(1) (2006). The purpose of the overtime provision was to compensate workers for the “burden of a workweek beyond the hours fixed in the Act” and to reduce unemployment by distributing the available work to unemployed workers. *Overnight Motor Transp. Co., Inc. v. Missel*, 316 U.S. 572, 578 (1942), *superseded by statute*, 29 U.S.C. §§ 251–262 (2006), *as recognized in* *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 128 n. 22 (1985).

14. The FLSA defines “employer” as “any person acting directly or indirectly in the interest of an employer in relation to an employee.” 29 U.S.C. § 203(d) (2006).

15. 29 U.S.C. § 203(e). Independent contractors are not “employees” under the FLSA. *See id.* To determine whether an individual is an employee or an independent contractor, courts have adopted different versions of the economic realities test. *See Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1059 (2d Cir. 1988) (citations omitted) (indicating that the inquiry whether an individual is an independent contractor or an employee is “whether, as a matter of economic reality, the workers depend upon someone else’s business for the opportunity to render service or are in business for themselves.”). For a description of the multi-factor economic realities test, see *Bartels v. Birmingham*, 332 U.S. 126, 130 (1947). While some courts have embraced a multi-factor economic realities test, others are looking at only four factors. *See Villarreal v. Woodham*, 113 F.3d 202, 205 (11th Cir. 1997) (citation omitted) (determining that the four factors are “whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records.”).

protection of the FLSA, an employee must also be “engaged in commerce or in the production of goods for commerce”<sup>16</sup> or must be employed in an “enterprise engaged in commerce or in the production of goods for commerce”<sup>17</sup>

Furthermore, the FLSA specifies a number of categories of employees who are excluded from its coverage.<sup>18</sup> On one hand, employees at the top end of the occupational hierarchy who are “employed in a bona fide executive, administrative, or professional capacity,”<sup>19</sup> or who are “outside salesm[e]n” or computer professionals, are not covered under the FLSA.<sup>20</sup> The exemption for this category of workers is also referred to as the white-collar exemption.<sup>21</sup> On the other hand, workers who are at the bottom of the

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16. 29 U.S.C. §§ 206(a), 207(a)(1) (2006); *see also* *Boekemeier v. Fourth Universalist Soc’y*, 86 F. Supp. 2d 280, 287 (S.D.N.Y. 2000) (quoting *McLeod v. Threlkeld*, 319 U.S. 491, 497 (1943) (noting that “[t]he test . . . is not whether the employee’s activities affect or indirectly relate to interstate commerce but whether they are actually in or so closely related to the movement of the commerce as to be a part of it”).

17. 29 U.S.C. §§ 206(a), 207(a)(1). The enterprise coverage provision was added to the FLSA in 1961 and broadened the scope of the statute. *See Tony & Susan Alamo Found. v. Sec’y of Labor*, 471 U.S. 290, 295 n.8 (1985). Even if 29 U.S.C. § 203(r) provides a definition of “enterprise” as “the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose,” there have still been a number of cases dealing with the issue of whether certain employers can be characterized as “enterprises” for the purpose of the FLSA. *See, e.g., Donovan v. Easton Land & Dev., Inc.*, 723 F.2d 1549, 1553 (11th Cir. 1984) (holding that a hotel and lounge were not an “enterprise” because of lack of related activities and common business purpose); *Chao v. Vidtape, Inc.*, 196 F. Supp. 2d 281, 291 (E.D.N.Y. 2002) (holding that *Vidtape* and *Inventive* were an “enterprise”).

18. *See* 29 U.S.C. § 213(a) (2006). The employer has the burden of proving that the employee falls within one of the exceptions enumerated by the statute. *See Douglas v. Argo-Tech Corp.*, 113 F.3d 67, 70 (6th Cir. 1997).

19. *See* 29 U.S.C. § 213(a)(1); *see, e.g., Slusser v. Vantage Builders, Inc.*, 576 F. Supp. 2d 1207, 1222-23 (D.N.M. 2008) (holding that employee’s BlackBerry use did not entitle employee to overtime because of employee’s managerial role). *See generally* Peter D. DeChiara, *Rethinking the Managerial-Professional Exemption of the Fair Labor Standard Act*, 43 AM. U. L. Rev. 139, 140 (1993) (arguing that the FLSA exemption of managerial and professional employees has no legitimate rationale). To determine whether an employee falls under the white-collar exemption, courts look at the function performed by the employee, rather than the title of the position held by the employee. *See Anderson v. City of Cleveland*, 90 F. Supp. 2d 906, 916-17 (E.D. Tenn. 2000).

20. *See* 29 U.S.C. § 213(a)(1), (17); *see also* 29 C.F.R. § 541.600 (2010) (setting the salary cutoff for overtime exemptions to \$455 per week for all executive, administrative or professional exempt employees).

21. *See generally* U.S. GEN. ACCOUNTING OFFICE, GAO/HEHS-99-164, FAIR LABOR STANDARDS ACT: WHITE-COLLAR EXEMPTIONS IN THE MODERN WORK PLACE (1999).

occupational hierarchy, such as employees of seasonal amusement and recreational businesses and agricultural and domestic workers, are not covered either.<sup>22</sup> As a general rule, these exceptions for employees at the top and lower end of the occupational hierarchy are “to be ‘narrowly construed against the employers seeking to assert [them].’”<sup>23</sup>

*B. Work: FLSA’s Undefined Element*

Determining whether an FLSA non-exempt employee is entitled to compensation for the after-hours use of her smartphone—be that in the context of on-call time<sup>24</sup> or as a preliminary or postliminary work activity<sup>25</sup>—involves examining the definition of “work.”<sup>26</sup> If on-call duty is not “work,” the employee need only receive compensation for time spent actively responding to her employer’s call on her smartphone, but if on-call time is “work,” the employee must be paid at least the minimum wage for the time spent on-call.<sup>27</sup> Similarly, if time spent performing a preliminary or postliminary activity to the employee’s job is not “work,” the employee will receive compensation only for his or her set work hours, but if time spent performing a preliminary or postliminary work activity is “work,” the employee must be paid at least the minimum wage for that time.<sup>28</sup>

However, there is little statutory and regulatory guidance as to what constitutes “work” for the purpose of the FLSA overtime provision. The

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22. For a comprehensive list of all workers at the low end of the occupational hierarchy who are not covered under the FLSA, see 29 U.S.C. § 213(a)(3)–(16), (b)(1)–(30).

23. *Douglas*, 113 F.3d at 70 (quoting *Arnold v. Ben Kanowsky Inc.*, 36 U.S. 388, 392 (1960)); see *Jeffery v. Sarasota White Sox, Inc.*, 64 F.3d 590, 594 (11th Cir. 1995); *Avery v. City of Talladega*, 24 F.3d 1337, 1340 (11th Cir. 1994).

24. See *infra* Part I.C (discussing on-call time in detail).

25. See *infra* Part I.D (discussing time spent performing preliminary or postliminary work activities in detail).

26. See 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, 448 (2002) (indicating that “the definition of ‘work’ becomes key to the issue of on-call time”).

27. Eric Phillips, Note, *On-Call Time Under the Fair Labor Standards Act*, 95 MICH. L. REV. 2633, 2634 (1997) (footnote omitted). The issue is the time spent waiting to be called by the employer, not the time spent actually responding to the employer’s calls. *Id.* at 2634 n.8.

28. See *IBP, Inc. v. Alvarez*, 546 U.S. 21, 33 (2006) (indicating that preliminary and postliminary work activities are compensable and thus considered “work” if they are “integral and indispensable” to “principal activities”).

FLSA does not define “work,”<sup>29</sup> but just indicates that to “employ includes to suffer or permit to work.”<sup>30</sup> Furthermore, “Congress did not include a definition of the term ‘hours worked’ when enacting the original legislation”<sup>31</sup> and the Portal-to-Portal Act that amended the FLSA also omits any definition of the word “work.”<sup>32</sup> The Department of Labor (DOL) does not provide any additional guidance when it defines compensable time as time during which an employee is “on duty on the employer’s premises or at a prescribed workplace, as well as all other time during which the employee is suffered or permitted to work for the employer.”<sup>33</sup>

With little guidance from statutes and DOL regulations as to what constitutes “work” for the purpose of the FLSA overtime provision, the judicial branch is left as the only source that can provide assistance in identifying the instances that overtime qualifies as compensable time.<sup>34</sup> An examination of the existing case law regarding the two most common types of overtime—on-call time and time spent performing preliminary and postliminary work activities—will provide insight into whether off-the-clock smartphone use constitutes “work.”

### C. On-Call Time

On-call time is the time an employee spends when she is physically away from the workplace; remains connected to it by smartphone, normal telephone, beeper, or computer; and must respond to the employer’s calls.<sup>35</sup>

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29. *Id.* at 25 (footnote omitted) (“Neither ‘work’ nor ‘workweek’ is defined in the statute.”).

30. *See* 29 U.S.C. § 203(g) (2006). The FLSA “was not intended to cover those without any express or implied compensation who may work for their own advantage on the premises of another.” Morgan K. Whitlatch & Alexei Klestoff, *Employment-Related Crimes*, 38 AM. CRIM. L. REV. 555, 580 n.136 (2001) (citations omitted); *see, e.g.*, *Brouwer v. Metro. Dade County*, 139 F.3d 817, 819 (11th Cir. 1998) (holding that Dade County jurors were not employees for purposes of the FLSA); *Donovan v. Trans World Airlines, Inc.*, 726 F.2d 415, 416-17 (8th Cir. 1984) (holding that flight attendant trainees were not employees for purposes of the FLSA).

31. Elizabeth D. Feigin, Note, *Achieving Justice for On-Call Workers: Amending the Fair Labor Standards Act*, 84 IOWA L. REV. 351, 352 n.8 (quoting [1 Wages-Hours] Lab. L. Rep. (CCH) P 25,301 (1998)).

32. *Alvarez*, 546 U.S. at 26.

33. 29 C.F.R. § 553.221(b) (2010).

34. *See Kirschbaum v. Walling*, 316 U.S. 517, 523 (1942) (determining that Congress had given to the judicial branch the responsibility to interpret the provisions of the FLSA).

35. Phillips, *supra* note 27, at 2633 (footnote omitted) (indicating that although an employee has greater freedom to be involved in personal activities than she does while

Because the FLSA does not provide a definition of “work,”<sup>36</sup> the issue of when an on-call employee is working has been addressed by the Supreme Court and more recently by the lower courts.<sup>37</sup>

The Supreme Court dealt with the issue of on-call compensation in 1944 when it decided *Armour & Co. v. Wantock*<sup>38</sup> and *Skidmore v. Swift & Co.*,<sup>39</sup> two cases involving firefighters required to remain on the employer’s premises while off duty.<sup>40</sup> In *Armour*, the Supreme Court specified that time spent waiting for work is compensable under the FLSA, if the waiting time is “spen[t] predominantly for the employer’s benefit.”<sup>41</sup>

In *Skidmore*, the Court indicated that time spent “waiting to be engaged” is not compensable under the FLSA, but if the employees are “engaged to wait” time is compensable.<sup>42</sup> “For example, a secretary who reads a book while waiting for dictation or a fireman who plays checkers while waiting for an alarm” is “engaged to wait.”<sup>43</sup> An inquiry into whether time was “spen[t] predominantly for the employer’s benefit” is necessary to distinguish between “waiting to be engaged” and “engaged to wait.”<sup>44</sup> The *Skidmore* Court held that this inquiry involves looking at four factors: (1) the “construction of the agreements between the particular parties” regarding on-call time; (2) the “appraisal of [the] practical construction of the working agreement[s] by conduct;” (3) the nature of the job and “its relation to the waiting time;” and (4) “all of the surrounding

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working a normal shift, the employee “is never truly free from work” and should expect to be interrupted by the employer’s calls at any time).

36. See *supra* Part I.B.

37. See *infra* notes 38-69 and accompanying text.

38. 323 U.S. 126 (1944).

39. 323 U.S. 134 (1944).

40. See Feigin, *supra* note 31, 359-61 (discussing the two cases).

41. 323 U.S. at 132-33.

42. 323 U.S. at 137.

43. U.S. Dep’t of Labor, *Fact Sheet #22: Hours Worked Under the Fair Labor Standards Act (FLSA)*, U.S. WAGE & HOUR DIV., <http://www.dol.gov/whd/regs/compliance/whdfs22.pdf> (last updated July 2008).

44. See *Armour*, 323 U.S. at 133; see also *Dinges v. Sacred Heart St. Mary’s Hosp’s, Inc.*, 164 F.3d 1056, 1058 (7th Cir. 1999) (internal quotation marks omitted) (trying to make a sense of the distinction between “waiting to be engaged” and “engaged to wait” by holding 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.”). But see *Owens v. Local No. 169*, 971 F.2d 347, 354 (9th Cir. 1992) (citations omitted) (holding that the proper test “is not the importance of on-call work to the employer, rather the test is focused on the employee and whether he is so restricted during on-call hours as to be effectively engaged to wait.”).

circumstances.”<sup>45</sup> However, the Supreme Court “did not regard these four factors as an exclusive list”<sup>46</sup> and specified that it did not lay down a single “legal formula to resolve cases so varied in their facts.”<sup>47</sup>

Unlike the *Armour* and *Skidmore* “waiting time” cases, where “employees were required to remain on or close to the employer’s premises, most contemporary on-call arrangements provide for greater physical freedom, permitting employees to go home and perform certain tasks for the employer without having to return to the employer’s premises.”<sup>48</sup> In some cases, on-call employees have to be on-call longer than their work shifts and some “employees may be placed on call the entire time they are not performing their regular service.”<sup>49</sup>

Faced with a new pattern of on-call situations and little guidance from the Supreme Court as to what constitutes compensable and non-compensable on-call time,<sup>50</sup> lower courts have adopted different interpretations of what constitutes compensable time.<sup>51</sup> While the Tenth Circuit has been more lenient in its inquiry by focusing its attention on the burden of the on-call duty on the employee’s personal pursuits,<sup>52</sup> the Fifth,

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45. See *Skidmore*, 323 U.S. at 137.

46. Feigin, *supra* note 31, at 360 (footnote omitted).

47. *Skidmore*, 323 U.S. at 136.

48. Phillips, *supra* note 27, at 2638-39 (footnotes omitted). For a recent example of a case involving the circumscription of the employee’s freedom to move, see *Brigham v. Eugene Water & Electric Board*, 357 F.3d 931 (9th Cir. 2004).

49. Phillips, *supra* note 27, at 2639 (footnote omitted); see, e.g., *Bright v. Houston Northwest Med. Ctr. Survivor, Inc.*, 934 F.2d 671, 678-79 (5th Cir. 1991) (holding that an employee who was always on-call when not at work was not entitled to overtime compensation), *cert. denied*, 502 U.S. 1036 (1992); *Cross v. Arkansas Forestry Comm’n*, 938 F.2d 912, 916-17 (8th Cir. 1991) (holding that employees who were on call twenty-four hours a day were entitled to overtime compensation).

50. See Feigin, *supra* note 31, at 361 (indicating that the Supreme Court in *Skidmore* and *Armour* failed “to articulate a workable standard for determining on-call compensability”).

51. See *id.* at 361-63; Phillips, *supra* note 27, at 2639-40.

52. See Phillips, *supra* note 27, at 2639; see, e.g., *Andrews v. Town of Skiatook*, 123 F.3d 1327, 1329-30, 1332 (10th Cir. 1997) (involving restrictions such as constant availability by pager, clean and appropriate dress, inability to drink alcohol, and ability to be in the ambulance responding to a call within five to ten minutes); *Gilligan v. City of Emporia*, 986 F.2d 410, 411, 413 (10th Cir. 1993) (involving restrictions such as constant availability by pager, inability to drink alcohol, and ability to report within thirty minutes or one hour of a call); *Armitage v. City of Emporia*, 982 F.2d 430, 432-33 (10th Cir. 1992) (involving requirements that detectives on-call remained sober, could be reached by beeper, and could report to duty within twenty minutes); *Renfro v. City of Emporia*, 948 F.2d 1529,

Sixth, and Eleventh Circuits award compensation only when a severe burden was placed on the employee.<sup>53</sup> The circuits dealing with the question of what constitutes compensable time have looked at two predominant factors: (1) “the degree to which the employee is free to engage in personal activities;”<sup>54</sup> and (2) “the agreements between the particular parties.”<sup>55</sup>

In determining the degree to which the employee is free to engage in personal activities while on-call, the circuits use different factors in their

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1537-38 (10th Cir. 1991) (involving restriction such as responding to an average three to five callbacks per twenty-four hour period), *cert. denied*, 503 U.S. 915 (1992). *But see* Boehm v. Kansas City Power & Light Co., 868 F.2d 1182, 1185-86 (10th Cir. 1989) (holding that on-call time was not spent predominantly for the employer’s benefit in spite of company’s policy requiring employee to spend some time at home that the employee would not have spent otherwise); Norton v. Worthen Van Serv., Inc., 839 F.2d 653, 654, 656 (10th Cir. 1988) (holding that on-call time was not spent predominantly for the employer’s benefit in spite of restriction to be “near enough to the employer’s premises to be able to respond to calls within fifteen to twenty minutes”).

53. *See* Phillips, *supra* note 27, at 2639; *see, e.g.*, Birdwell v. City of Gadsden, 970 F.2d 802, 810 (11th Cir. 1992) (requiring that “employee’s free time must be severely restricted” in order to be compensated); Martin v. Ohio Turnpike Comm’n, 968 F.2d 606, 611 (6th Cir. 1992) (holding that to prevail an employee must show that the on-call duty “seriously” interfered with the employee’s personal activities); Bright, 934 F.2d at 678 (recognizing that plaintiff’s on-call status made plaintiff’s job “highly undesirable and arguably somewhat oppressive,” but nevertheless holding that “the FLSA’s overtime provisions are more narrowly focused than being simply directed at requiring extra compensation for oppressive or confining conditions of employment”); Rousseau v. Teledyne Movable Offshore, Inc., 805 F.2d 1245, 1248 (5th Cir. 1986) (internal quotation marks omitted) (holding that plaintiffs who were required to remain on the employer’s premises were not entitled to overtime compensation because they “were free to sleep, eat, watch television . . . [and] seldom or never did any physical work after their shift ended”), *cert. denied*, 484 U.S. 827 (1987); Allen v. Atlantic Richfield Co., 724 F.2d 1131, 1137-38 (5th Cir. 1984) (holding that time was not spent predominantly for the employer’s benefit even if plaintiffs were required to remain on the premises of the employer’s refinery during a two-and-one-half month production worker’s strike).

54. Skidmore v. Swift & Co., 323 U.S. 134, 138 (1944); *see, e.g.*, Owens v. Local No. 169, 971 F.2d 347, 350 (9th Cir. 1992); Bright, 934 F.2d at 677-78; Halferty v. Pulse Drug Co., 864 F.2d 1185, 1189 (5th Cir. 1989).

55. Skidmore, 323 U.S. at 137; *see, e.g.*, Owens, 971 F.2d at 354-55; Brock v. El Paso Natural Gas Co., 826 F.2d 369, 372 (5th Cir. 1987); Rousseau, 805 F.2d at 1248. The Supreme Court set the stage for the inquiry into the agreements between the parties: An inquiry into compensability of on-call waiting time “involves scrutiny and construction of the agreements between the particular parties, appraisal of their practical construction of the working agreement by conduct. . . . The law does not impose an arrangement upon the parties. It imposes upon the courts the task of finding what the arrangement was.” Skidmore, 323 U.S. at 137.

analysis, with no one factor being held dispositive.<sup>56</sup> The Ninth Circuit, for example, has adopted a list of seven factors, which is a compilation of factors used by other circuits and the Supreme Court:<sup>57</sup> (1) whether the employee was required to remain at the employer's place of business;<sup>58</sup> (2) whether there were excessive geographical restrictions placed on the employee;<sup>59</sup> (3) whether the frequency of calls was restrictive;<sup>60</sup> (4) whether a fixed time limit for response was unduly restrictive;<sup>61</sup> (5) whether the on-call employee could easily trade on-call responsibilities;<sup>62</sup> (6) the method used to communicate a call to the employee;<sup>63</sup> and (7) whether the employee actually engaged in personal activities while on-call.<sup>64</sup> Nevertheless, other circuits use fewer and different factors,<sup>65</sup> resulting in

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56. *See Berry v. County of Sonoma*, 30 F.3d 1174, 1183 (9th Cir. 1994) (quoting *Owens*, 971 F.2d at 351). Courts balance these factors. *Id.*

57. *See Miner v. B & C Equip., Inc.*, No. 93-35401, 1994 WL 198692, at \*2-5 (9th Cir. May 18, 1994); *Owens*, 971 F.2d at 351. *Owens* also provides the source for each factor. *See infra* notes 58-64.

58. *See, e.g., Armour & Co. v. Wantock*, 323 U.S. 126, 134 (1944) (holding that firefighters restricted to the fire station were not free to use off-duty time for personal pursuits); *see also* 29 C.F.R. § 553.221 (2010) (“An employee who is not required to remain on the employer’s premises but is merely required to leave word at his home or with company officials where he may be reached is not working while on call.”).

59. *See, e.g., Cross v. Ark. Forestry Comm’n*, 938 F.2d 912, 916-17 (8th Cir. 1991) (holding that the requirement to remain within a thirty-five to fifty mile radius to monitor radio transmission did not permit employees to use on-call time for their own purposes).

60. *See, e.g., Renfro v. City of Emporia*, 948 F.2d 1529, 1538 (10th Cir. 1991) (holding that firefighters required to answer an average of three to five calls a day were not free to use off-duty time for personal pursuits), *cert. denied*, 503 U.S. 915 (1992).

61. *See, e.g., Bright v. Houston Northwest Med. Ctr. Survivor, Inc.*, 934 F.2d 671, 678 (5th Cir. 1991) (holding that a biomedical repair technician was able to engage in personal activities despite the twenty or thirty minute required response time), *cert. denied*, 502 U.S. 1036 (1992).

62. *See, e.g., Brock v. El Paso Natural Gas Co.*, 826 F.2d 369, 373 (5th Cir. 1987) (holding that the on-call policy was not unduly restrictive in part because employees could trade on-call responsibilities).

63. *See, e.g., Norton v. Worthen Van Serv., Inc.*, 839 F.2d 653, 655-56 (10th Cir. 1988) (holding that drivers could purchase a simple paging device to allay the necessity of staying by a phone).

64. *See, e.g., id.* at 655 (holding that employees’ on-call time spent “at the homes of friends, at church, at laundromats, at restaurants, at pool halls, and at a local gymnasium” demonstrated their ability to engage in personal activities).

65. *See, e.g., Cross v. Ark. Forestry Comm’n*, 938 F.2d 912, 916-17 (8th Cir. 1991) (emphasizing the ability to travel or to engage in personal activities, the required response time, the difficulty of monitoring calls, the possibility of the need to respond immediately,

different circuit courts reaching different conclusions in cases with similar facts.<sup>66</sup>

As previously noted, the agreement between parties is another predominant factor in determining whether the on-call time was spent mainly for the employer's benefit.<sup>67</sup> There are three different types of agreements between employer and employees, which are relevant to the issue of on-call compensation: (1) a collective bargaining agreement "that provides overtime compensation for actual call-in work, but not for other off-duty work;" (2) a constructive agreement that arises if an employee has "been informed of the overtime compensation policy and continue[s] to work under the disclosed terms of the policy;" and (3) an express agreement.<sup>68</sup> Nevertheless, agreements, although a predominant and relevant factor to be considered in the on-call analysis, are not dispositive and not always controlling.<sup>69</sup>

#### D. Preliminary and Postliminary Work Activities

On-call time is not the only type of overtime covered under the FLSA and relevant to the analysis of smartphone overtime compensation. An employee could be entitled to overtime compensation under the FLSA for the time spent on activities that are preliminary or postliminary to the employee's job, meaning those activities completed before or after the official work shift.<sup>70</sup> Examples of preliminary and postliminary work

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and whether the on-call employee was ever relieved from duty); *Renfro*, 948 F.2d at 1537-38 (emphasizing the number of callbacks, whether the employee could hold another job, whether the employee could trade shifts, and whether the time could be used for personal pursuits).

66. See Phillips, *supra* note 27, at 2640.

67. See *Berry v. County of Sonoma*, 30 F.3d 1174, 1180-81 (9th Cir. 1994); *Owens v. Local No. 169*, 971 F.2d 347, 354 (9th Cir. 1992).

68. *Berry*, 30 F.3d at 1180-81 ("An agreement between the parties which provides at least some type of compensation for on-call waiting time may suggest the parties characterize waiting time as work. Conversely, an agreement pursuant to which the employees are to be paid only for time spent actually working, and not merely waiting to work, may suggest the parties do not characterize waiting time as work."); see also *Owens*, 971 F.2d at 354-55.

69. See *Berry*, 30 F.3d at 1181 (indicating that "emphasis of the parties' agreements as a predominant factor is not intended to suggest that agreements are controlling regardless of the character of the uncompensated time at issue"); see also *Owens*, 971 F.2d at 354.

70. See 29 U.S.C. § 254(a) (2006) (defining preliminary and postliminary work activities as those "which occur either prior to the time on any particular workday at which

activities include walking, riding, or traveling to and from the actual work place, time spent donning (putting on) and doffing (taking off) uniforms or protective equipment, or time spent checking necessary e-mails before or after the work shift.<sup>71</sup>

The Portal-to-Portal Act<sup>72</sup> amended the FLSA in 1947 to specifically relieve employers of the obligation to compensate employees for “activities which are preliminary to or postliminary to said principal activity or activities,”<sup>73</sup> thus limiting employers’ liability.<sup>74</sup> Congress adopted the Portal-to-Portal Act in response to *Anderson v. Mt. Clemens Pottery Co.*,<sup>75</sup> a Supreme Court case that opened the gates to litigation by expanding compensable work under the FLSA to activities such as walking to work stations and donning necessary work gear.<sup>76</sup>

While the Portal-to-Portal Act placed limitations on the FLSA, the Supreme Court created an exception to these limitations in *IBP, Inc. v. Alvarez*.<sup>77</sup> In *Alvarez*, the Supreme Court held that walking to and from changing areas to work areas was compensable time, but time spent waiting

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such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities”).

71. See, e.g., *IBP, Inc. v. Alvarez*, 546 U.S. 21, 40-42 (2006) (holding that walking to and from changing areas to work areas was compensable time); *Steiner v. Mitchell*, 350 U.S. 247, 256 (1956) (holding that donning and doffing of the protective gear before and after the actual work shift were compensable activities); *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 690-92 (1946) (holding as compensable the time spent walking from a time clock to the production floor, as well as time spent conducting the preliminary activity of donning non-protective gear).

72. 29 U.S.C. § 254(a). The Portal-to-Portal Act also excludes commuting time from compensable time. *Id.*; 29 C.F.R. § 785.35 (2010). However, in some instances travel time is compensable. See 29 C.F.R. §§ 785.36–785.41 (enumerating the exceptions when travel time is compensable).

73. *Von Friewalde v. Boeing Aerospace Operations, Inc.*, 339 F. App’x 448, 454 (5th Cir. 2009) (quoting 29 U.S.C. § 254(a)). Specifically, the Portal-to-Portal Act restricts the definition of a compensable workday and defines the preliminary and postliminary work activities. 29 U.S.C. § 254(a) (2006).

74. See 29 U.S.C. § 251 (2006).

75. 328 U.S. at 690-92 (holding that time spent walking from time clocks at factory gate to workstations was compensable).

76. Congress noted that FLSA had “been interpreted judicially in disregard of long-established customs, practices, and contracts between employers and employees, [and] thereby created wholly unexpected liabilities, immense in amount and retroactive in operation.” 29 U.S.C. § 251(a) (2006).

77. 546 U.S. 21 (2006). *Alvarez* resolved the circuit split between *IBP, Inc. v. Alvarez*, 339 F.3d 894 (9th Cir. 2003), *aff’d in part*, 546 U.S. 21 (2005) and *Tum v. Barber Foods, Inc.*, 360 F.3d 274 (1st Cir. 2004), *rev’d in part*, 546 U.S. 21 (2005).

to change was not statutory compensable.<sup>78</sup> The Court expanded the compensable workday by indicating that preliminary and postliminary work activities are compensable if they are “integral and indispensable” to “principal activities.”<sup>79</sup> However, the Court’s holding in *Alvarez* has left many questions unanswered, such as what constitutes “any activity that is ‘integral and indispensable’”<sup>80</sup> and what are the appropriate boundaries of a workday.<sup>81</sup> Lower courts have attempted to grapple with these questions and in *Dunlop v. City Electric, Inc.*, the Fifth Circuit held that the proper test “to determine which activities are ‘principal’ and which are ‘an integral and indispensable part’ of such activities, is . . . whether the activities in question . . . are performed as part of the regular work of the employees in the ordinary course of business.”<sup>82</sup>

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78. 546 U.S. at 41-42. Time waiting to doff was compensable because it occurred after the principal activity, while time spent waiting to don was not compensable because it constituted a preliminary activity. *Id.* The Supreme Court also noted that “the fact that certain preshift activities are necessary for employees to engage in their principal activities does not mean that those preshift activities are ‘integral and indispensable’ to a ‘principal activity.’” *Id.*

79. *Id.* at 33. Principal job activities are those that primarily benefit the employer. *Id.* at 25. The Supreme Court held that “any activity that is ‘integral and indispensable’ to a ‘principal activity’ is itself a ‘principal activity’ under § 4(a) of the Portal-to-Portal Act.” *Id.* at 37.

80. Christine D. Higgins, Note, *Can I Get Paid for That?: The Compensability of Commuting Time Post-IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005), 86 NEB. L. REV. 208, 218 (2007) (quoting *Alvarez*, 546 U.S. at 37).

81. See Lynn M. Carroll, Case 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) (discussing how the failure to “fully define the scope of the workday . . . could result in an onslaught of employment litigation to determine the actual limitations of these concepts”); Neville F. Dastoor & Shane T. Munoz, *Column, Labor and Employment Law: IBP v. Alvarez*, 80 FLA. B.J. 37, 40 (2006) (“Questions also exist as to the practical breadth of the compensable workday.”).

82. 527 F.2d 394, 400-01 (5th Cir. 1976) (mentioning that the proper test is “not whether the activities in question are uniquely related to the predominant activity of the business”). The Ninth Circuit has adopted a similarly broad definition of “principal activities.” See *Rutti v. LoJack Corp.*, 596 F.3d 1046, 1055 (9th Cir. 2010) (quoting *Dunlop*, 527 F.2d at 401) (indicating that “principal activities” are those “necessary to the business and . . . performed by the employees, primarily for the benefit of the employer, in the ordinary course of that business”); *Lindow v. United States*, 738 F.2d 1057, 1061 (9th Cir. 1984) (internal quotation marks omitted) (indicating that the term “principal activities” is to be liberally construed “to include any work of consequence performed for an employer no matter when the work is performed”).

Furthermore, while an employee is entitled to compensation for preliminary or postliminary work activities that are “integral and indispensable” to “principal activities,”<sup>83</sup> those particular activities also cannot be *de minimis*.<sup>84</sup> However, courts are still struggling to define what amounts to *de minimis* work.<sup>85</sup> While the period that is normally regarded as a cut-off for *de minimis* overtime is ten minutes,<sup>86</sup> “that number had not been treated as a rigid maximum.”<sup>87</sup> Thus, there is no precise amount of time set by the courts where an employee may be denied compensation because the time worked was *de minimis*.<sup>88</sup> Rather, courts follow a three-prong factor test to determine whether time was *de minimis*: “(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>89</sup> The test reflects a balance between requiring an employer to pay for the activities it demands from its employees and the

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83. See *supra* notes 70-82 and accompanying text.

84. The *de minimis* rule was first advanced by the Supreme Court in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946). The Supreme Court noted 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. . . . It is only when an employee is required to give up a substantial measure of his time and effort that compensable working time is involved.” *Id.* at 692.

85. See Eric Kendall Banks & Stacia Boden, *Off-the-Clock Considerations: “On the Phone” Can Mean “On the Clock” for Employees*, KUTAK ROCK LLP, [http://www.kutakrock.com/index.cfm?fuseaction=DspNewsDetails&id=1149&site\\_id=45&cat=1](http://www.kutakrock.com/index.cfm?fuseaction=DspNewsDetails&id=1149&site_id=45&cat=1) (last visited Nov. 5, 2010).

86. A number of courts have found daily periods of ten minutes as *de minimis*. See, e.g., *E.I. du Pont de Nemours & Co. v. Harrup*, 227 F.2d 133, 135-36 (4th Cir. 1955) (ten minutes); *Green v. Planters Nut & Chocolate Co.*, 177 F.2d 187, 188 (4th Cir. 1949) (ten minutes); *Carter v. Panama Canal Co.*, 314 F. Supp. 386, 392 (D.D.C. 1970) (two to fifteen minutes), *aff’d*, 463 F.2d 1289 (D.C. Cir.), *cert. denied*, 409 U.S. 1012 (1972). *But see* *Usery v. City Elec.*, No. A-71-CA-67, 1976 WL 1697, at \*2 (W.D. Tex. Dec. 14, 1976) (fifteen to twenty minutes not *de minimis*).

87. *Carlsen v. United States*, 521 F.3d 1371, 1380 (Fed. Cir. 2008).

88. See *Lindow v. United States*, 738 F.2d 1057, 1062 (9th Cir. 1984) (citing *Frank v. Wilson & Co.*, 172 F.2d 712, 716 (7th Cir. 1949)) (noting that “[n]o rigid rule can be applied with mathematical certainty” to determine the *de minimis* time). “Rather, common sense must be applied to the facts of each case.” *Id.*

89. *Rutti v. LoJack Corp., Inc.*, 596 F.3d 1046, 1057 (9th Cir. 2010) (quoting *Lindow*, 738 F.2d at 1063) (holding that the application of the three-prong test to the facts of the case did not compel a conclusion that plaintiff’s after-hours PDT transmissions to his employer were *de minimis*).

need to avoid “[s]plit-second absurdities” that “are not justified by the actuality of working conditions.”<sup>90</sup>

## II. CHALLENGING THE OVERTIME FRAMEWORK

Through the existing overtime case law, courts have developed standards for what constitutes “work” in the context of the on-call time and the time spent performing preliminary and postliminary work activities.<sup>91</sup> While courts have successfully applied these standards in cases involving portable communication devices such as cell phones and pagers,<sup>92</sup> courts have just started to deal with smartphone overtime claims.<sup>93</sup> This Part explores the challenges that courts will face in applying the current overtime standards to claims involving off-the-clock smartphone use and concludes that courts will have to adopt new factors in order to properly analyze and decide smartphone overtime claims.

### A. *The On-Call Time Standard and the Smartphone*

*Rulli v. CB Richard Ellis Inc.*,<sup>94</sup> a case that has not been decided yet, is emblematic of the new wave of smartphone on-call claims.<sup>95</sup> John Rulli, a

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90. *Id.* (quoting *Lindow*, 738 F.2d at 1062).

91. *See supra* Part I.C and Part I.D.

92. *See, e.g.*, *Adair v. Charter County of Wayne*, 452 F.3d 482, 486-89 (6th Cir. 2006) (holding that the employer’s on-call policy at issue presented no objective restrictions on the employees’ off-duty time besides requiring them to carry pagers and the employees failed to demonstrate that they received so many calls that they could not effectively use their off-duty time); *Whitten v. City of Easley*, 62 F. App’x 477, 481 (4th Cir. 2003) (holding that firefighters who were allowed to maintain a part-time job and pursue personal interests while they were on call and carrying a pager were waiting to be engaged and were not entitled to overtime pay for the periods they were on call).

93. Smartphone overtime lawsuits were first filed in 2009. *See infra* notes 94-98. With smartphones being regarded as better satisfying “the needs of businesses for cost-effective, highly efficient, and robust operations” than traditional cell phones or pagers, it is likely that courts will experience a reduction in cell phone and pager overtime cases and an increase in smartphone overtime cases. *See ZHENG & NI, supra* note 1, at 16; *see also* Jeffrey Selingo, *The Bell Is Tolling for the Beeper*, N.Y. TIMES, Apr. 11, 2002, at G1 (describing the pager as a “dying technology”).

94. Complaint, *Rulli v. CB Richard Ellis Inc.*, No. 09-CV-00289 (E.D. Wis. Mar. 13, 2009). As of November 2010, the case is still in the discovery phase.

95. Another similar case is *Agui v. T-Mobile USA Inc.*, No. 09-2955 (E.D.N.Y. July 10, 2009). In *Agui*, a number of T-Mobile employees alleged that they were issued smartphones and were required to review and respond to communications (telephone calls, conference calls, e-mails, and text messages) from other T-Mobile employees at all hours without being

Wisconsin maintenance worker, claimed he and other nonexempt maintenance workers were required to use company-issued BlackBerrys after-hours in violation of the FLSA.<sup>96</sup> The complaint in *Rulli* maintained that the maintenance workers were expected to have their BlackBerrys with them at all times and were expected to return any call or message within fifteen minutes.<sup>97</sup> Plaintiffs asked for “relief under the FLSA for unpaid overtime compensation, liquidated damages, costs, attorneys’ fees, declaratory and/or injunctive relief.”<sup>98</sup>

*Rulli* describes employees using their smartphones to make phone calls, send text messages, or answer e-mails while on-call and without receiving overtime compensation.<sup>99</sup> To decide whether employees like the ones in *Rulli* are entitled to overtime compensation, courts will apply the current on-call standard and look at the agreements between the parties regarding overtime compensation, as well as at the employee’s ability to engage in personal activities.<sup>100</sup>

Courts are likely not to find any agreements between the employer and employee regarding overtime compensation, as at least one study has shown that most companies do not have in place any written or oral policies dealing with overtime compensation for after-hours smartphone use.<sup>101</sup> As

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paid overtime. Complaint at 9-10, *Agui v. T-Mobile USA Inc.*, No. 09-2955 (E.D.N.Y. July 10, 2009). When the T-Mobile employees reported the overtime hours to the management, the “employees were told nothing could be done and they should expect to work extra hours as part of T-Mobile’s ‘standard business practices.’” Ashby Jones, *A Boom in ‘Overtime’ Lawsuits? Blame Technology*, WALL ST. J. L. BLOG (Aug. 10, 2009, 9:03 AM), <http://blogs.wsj.com/law/2009/08/10/a-boom-in-overtime-lawsuits-blame-technology/> (describing the details of *Agui v. T-Mobile USA Inc.*). Plaintiffs sought to recover wages on behalf of themselves and other retail sales associates and supervisors for time worked “for which they received no compensation at all.” Complaint, *supra* note 94, at 1. The case was closed when the parties signed a confidential settlement. See Stipulation of Dismissal with Prejudice at 1, *Agui v. T-Mobile USA Inc.*, No. 09-2955 (E.D.N.Y. May 4, 2010) (indicating that the court “has reviewed in camera the parties’ confidential settlement agreement . . . and determined that the agreement is fair and reasonable”).

96. See Complaint, *supra* note 94, at 3-4.

97. *Id.* at 4; see also Sanserino, *supra* note 10, at B1 (“Mr. Rulli said he was handcuffed to his phone because the company required him to quickly respond to messages at any hour.”).

98. Complaint, *supra* note 94, at 1.

99. See *supra* notes 94-98 and accompanying text.

100. See *supra* Part I.C.

101. According to Mobi, an Indianapolis-based mobile-device management company, about one-third of U.S. companies have no written policies in place regarding the use of smartphones. See Kristen B. Frasch, *Sending the Wrong Message*, HUMAN RES. EXECUTIVE

for the analysis of the degree to which the employee is able to enjoy personal activities while being on-call and using the smartphone, the factors provided by the Ninth Circuit—a compilation of factors used by other circuits and the Supreme Court<sup>102</sup>—are useful: (1) whether the employee was required to remain at the employer’s place of business; (2) whether there were excessive geographical restrictions placed on the employee; (3) whether the frequency of calls was restrictive; (4) whether a fixed time limit for response was unduly restrictive; (5) whether the on-call employee could easily trade on-call responsibilities; (6) the method used to communicate a call to the employee; and (7) whether the employee actually engaged in personal activities while on-call.<sup>103</sup>

Under the first and second factors, whether the employee was required to remain at the employer’s place of business<sup>104</sup> and whether there were excessive geographical restrictions placed on the employee,<sup>105</sup> the court will have to look at the nature of the smartphone use. One of the implications and benefits of carrying a work-issued smartphone is being able to work from any location and not being confined to the boundaries of the office,<sup>106</sup> so an employee will always be disadvantaged by these two factors.

As for the third factor, which involves the frequency of calls being restrictive,<sup>107</sup> courts may find that responding to frequent calls and e-mails on a smartphone could inhibit work-free time segmentation and interfere with the employee’s use of free time for personal pursuits.<sup>108</sup> The same line

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ONLINE (Apr. 15, 2009), <http://www.hrexecutive.com/HRE/story.jsp?storyId=199269117>. Even in the case of companies that do have written policies describing the boundaries of device use, these policies “are most typically either to communicate the importance of security measures (don’t lose it) or emphasize that it is a business tool and not for personal use.” Porter, *supra* note 6, at 30. In addition to written policies, other sources for understanding the expectations for device use are the employee’s own guesses about intended use, oral instructions from management, and general understanding of organizational culture and expectations. *Id.*

102. *See supra* note 57 and accompanying text.

103. *See supra* notes 57-64 and accompanying text.

104. *See supra* note 58 and accompanying text.

105. *See supra* note 59 and accompanying text.

106. *See supra* note 6 and accompanying text; *infra* Part III.B (describing flexibility as one of the individual opportunities provided to employees by the use of a smartphone).

107. *See supra* note 60 and accompanying text.

108. For a discussion of the implications for employees of after-hours smartphone use, see Part III.A and Part III.B.

of reasoning goes for the fourth factor, whether a fixed time limit for response was unduly restrictive.<sup>109</sup>

As for the fifth factor, whether the on-call employee could easily trade on-call responsibilities,<sup>110</sup> in most situations involving smartphone use, the employee is not able to trade responsibilities and is given the smartphone with the expectation that she will use the device to perform her responsibilities.<sup>111</sup> The method used to communicate a call to the employee,<sup>112</sup> the sixth factor, is of course the smartphone. The seventh factor, which concerns whether the employee actually engaged in personal activities while on-call,<sup>113</sup> will be a fact-specific analysis that is likely to result in favor of the employer, due to the geographical flexibility afforded by smartphone use.<sup>114</sup>

Thus, a proper analysis of smartphone on-call situations involves courts going beyond the traditional framework of the on-call standard. A comprehensive application of each factor of the current on-call standard to smartphone overtime situations requires the courts to look at the nature of smartphone use. Courts need to consider the opportunities afforded by smartphone use and the negative effects of smartphone use, such as geographic flexibility or blurring of work-free time segmentation.<sup>115</sup> Even if the current on-call standard does not pertain to the burden on the employee and the benefit to the employee as factors,<sup>116</sup> a proper analysis of a smartphone overtime claim cannot be realized without scrutinizing these two elements as independent factors.

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109. See *supra* note 61 and accompanying text. It is most likely that the application of this factor will be fact-specific.

110. See *supra* note 62 and accompanying text.

111. See Mazmanian, Yates & Orlikowski, *supra* note 7 (discussing the expectations created by providing employees with smartphones).

112. See *supra* note 63 and accompanying text.

113. See *supra* note 64 and accompanying text.

114. See *infra* Part III.B (discussing an employee's limited ability to enjoy her free time while using the smartphone after hours). *But see* Middleton, *supra* note 6, at 172 (indicating how some smartphone users did not regard the device "as an infringement on personal time, but a means of controlling the work environment to better fit personal needs, offering liberation, freedom and peace of mind").

115. See *infra* Part III.

116. See generally Phillips, *supra* note 27, at 2641-44 (arguing that courts should consider the burden that on-call time places on employees).

*B. The Preliminary and Postliminary Work Activities Standard and the Smartphone*

While *Rulli* described a smartphone on-call situation,<sup>117</sup> there are also overtime claims involving the use of smartphones to perform preliminary or postliminary activities. One such overtime claim concerned a group of writers working for ABC News.<sup>118</sup> ABC News presented three writers with a waiver indicating that they would not be compensated for checking their BlackBerrys after work hours.<sup>119</sup> The waiver prompted concern from the Writers' Guild of America, and in response, ABC News stripped all of its writers of the company-issued BlackBerrys.<sup>120</sup> Negotiations between ABC News and the Writers' Guild of America resolved the conflict, and ABC News agreed to pay overtime to writers who put in substantial work after hours and returned the BlackBerrys to the writers.<sup>121</sup>

Employees, like the writers working for ABC News, who want overtime compensation for the time they have used their smartphones while performing work activities that are preliminary or postliminary must meet the current standard embraced by courts and prove that those activities are “integral and indispensable” to “principal activities,” as well as *de minimis*.<sup>122</sup>

While the Supreme Court in *IBP, Inc. v. Alvarez* did not provide a clear definition of the terms “integral and indispensable,”<sup>123</sup> in *Dunlop v. City Electric, Inc.*, the Fifth Circuit described an activity as “integral and indispensable” when it is “performed as part of the regular work of the

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117. See *supra* notes 94-98 and accompanying text.

118. See Brian Stelter, *ABC and Writers Skirmish Over After-Hours E-Mail*, N.Y. TIMES, June 23, 2008, at C4.

119. *Id.*

120. *Id.*

121. Buckley & Klein, *BlackBerry Overtime*, OVERTIME LAWYER BLOG (Feb. 11, 2009), [http://www.overtimelawyerblog.com/2009/02/blackberry\\_overtime.html](http://www.overtimelawyerblog.com/2009/02/blackberry_overtime.html) (describing the ABC News incident); see also Julia Boorstin, *BlackBerry Overtime: Should You Get Paid For Checking After Hours?*, CNBC (June 24, 2008, 4:29 PM), <http://www.cnbc.com/id/25353854> (expecting the ABC News incident to have an effect on the contracts between employers and employees in creative fields, in that the contracts would be increasingly specific about what constitutes work covered by the FLSA).

122. See *supra* Part I.D.

123. See *IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005); *supra* notes 77-81 and accompanying text.

employees in the ordinary course of business.”<sup>124</sup> Arguably, an employee who checks her e-mails before her shift in order to see and receive her work assignment is performing a task “in the ordinary course of business” that is “integral and indispensable” to the employee’s principal activities.

The *de minimis* analysis uses a three-prong test adopted by courts to determine the applicability of preliminary and postliminary work activities to smartphone overtime.<sup>125</sup> The first prong involves consideration of the practical administrative difficulty of recording the additional work.<sup>126</sup> While the time spent on a call can be traced from a phone bill and does not pose any difficulty in recording, the time spent reviewing an e-mail or responding to an e-mail is a more complicated issue. In that case, the employer will have to rely on the employee to keep track of that time and trust that the employee is being truthful in her rendition of the time worked.<sup>127</sup>

The second prong requires the examination of the aggregate amount of compensable work.<sup>128</sup> The court must engage in a fact specific analysis of the case, including how many minutes a day the employee was spending checking e-mails and answering phone calls. When analyzing this factor, it is important for courts to consider also that one of the effects of smartphone use is compulsivity,<sup>129</sup> which influences the amount of time an employee will spend using her smartphone. As for the final prong, the court must analyze the regularity of additional work.<sup>130</sup> Importantly, an employee’s use of a smartphone is in most cases frequent and even compulsive.<sup>131</sup>

As in the case of the on-call analysis, the analysis of preliminary and postliminary work activities involving smartphones touches upon the burden on and the benefit to the employee from smartphone use, and calls for the addition of these two factors to the traditional overtime standard. By considering the benefit to and the burden on the employee from smartphone use, courts are better equipped in deciding whether an employee is working within the meaning of the FLSA.

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124. *Dunlop v. City Elec. Inc.*, 527 F.2d 394, 400-01 (5th Cir. 1976); *see also supra* note 82.

125. *See supra* note 89 and accompanying text.

126. *Id.*

127. *See infra* notes 167-168 and accompanying text.

128. *See supra* note 89 and accompanying text.

129. *See infra* notes 134-137 and accompanying text.

130. *See supra* note 89 and accompanying text.

131. For a discussion of the compulsiveness provoked by smartphone use, *see infra* notes 134-137 and accompanying text.

### III. A NEW FRAMEWORK

The current overtime framework applied by courts in analyzing on-call time situations and situations involving time spent performing preliminary or postliminary work activities, is inadequate in the analysis of smartphone overtime claims.<sup>132</sup> A proper analysis of smartphone overtime claims will require courts to adopt a new framework that will involve looking at two additional factors—the benefit to the employee and the burden on the employee from smartphone use. By considering these two additional factors, courts will have all the tools necessary to decide adequately whether off-the-clock smartphone use constitutes compensable work under the FLSA.

#### A. *Burden on Employee from Smartphone Off-the-Clock Use*

Analyzing the burden on employees from smartphone off-the-clock use is crucial when determining whether an employee should be entitled to overtime compensation and will require that courts look at the employee's degree of compulsion when checking e-mail, as well as the employee's inability to disengage from work. Courts should contemplate how these two factors affect the employee's ability to enjoy her personal time and the *de minimis* time analysis.<sup>133</sup>

Courts should consider the employee's degree of compulsion when checking e-mails or voice messages on the smartphone.<sup>134</sup> An MIT Sloan study has shown that smartphone use encourages compulsive checking of e-mail and produces an inability to disengage from work.<sup>135</sup> According to the study, ninety percent of the respondents reported some degree of compulsion when describing their own behavior with the device, and no respondent was able to offer "substantive reasons, such as time-sensitive

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132. *See supra* Part II.

133. *See supra* Part I.D.

134. Compulsiveness or "mobile email addiction" may be manifested through different symptoms. *See* Ofir Turel & Alexander Serenko, *Viewpoint: Is Mobile Email Addiction Overlooked?*, 53 COMM. ACM 41, 41-42 (2010) (footnote omitted) ("When using mobile email, an addicted person may notice the activity dominates his or her thoughts and behaviors, offers a thrill of relief, and is difficult to control or to quit this behavior. It conflicts with other people and tasks, and causes negative emotions when interrupted. The symptoms of this addiction may [also] dramatically affect an addict's well-being.").

135. *See* Mazmanian, Yates & Orlikowski, *supra* note 7 (outlining the experiences and consequences of the use of wireless e-mail devices within a small private equity firm); *see also* Whitney Stewart, *Workday Never Done; Technology's New Tools Test Labor Practices*, WASH. TIMES, June 30, 2008, at B01 (describing the MIT Sloan study).

information or symbolic motivation, to explain their actions.”<sup>136</sup> The compulsive urge to check e-mails creates intensification in e-mail activity during off hours and increased expectation about a rapid response and frequent usage of the smartphone.<sup>137</sup>

Furthermore, courts should examine the inability of the employee to disengage from work while off-the-clock. The employee’s compulsion to check her smartphone frequently and the employer’s increased expectation that she do so<sup>138</sup> have led to the employee being unable to disengage from work.<sup>139</sup> Off-the-clock smartphone use leaves the employee without a clear marker to signal a shift from “work mode” to “home mode.”<sup>140</sup> The employee has to deal with a work-life conflict and has to negotiate her own

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136. Mazmanian, Yates & Orlikowski, *supra* note 7.

137. *Id.*; see also Middleton, *supra* note 6, at 175 (discussing how employees’ “perceptions of acceptable [high] engagement levels with their [smartphones] are influenced by organizational cultures that reinforce overwork and promote unrealistic expectations for employee engagement in their jobs”); Schlossberg & Malerba, *supra* note 2, at 9 (indicating that “many employees will say that being available after hours is a demonstration of dedication that likely would be rewarded by the employer”).

138. Besides the three enumerated implications of the off-the-clock smartphone use, generally using a smartphone in a work setting can prove to be distracting and anti-social. See Middleton & Cukier, *supra* note 6, at 252 (offering “a study of contradiction in the usage of mobile email”). Complaints about the impolite or disruptive usage of smartphone during business meeting have become common. See *id.*; Alex Williams, *Mind Your BlackBerry or Mind Your Manners*, N.Y. TIMES, June 22, 2009, at A1 (discussing BlackBerry etiquette at business meetings).

139. See generally Sirkka L. Jarvenpaa, Karl R. Lang & Virpi K. Tuunainen, *Friend or Foe? The Ambivalent Relationship Between Mobile Technology and Its Users*, in DESIGNING UBIQUITOUS INFORMATION ENVIRONMENTS: SOCIO-TECHNICAL ISSUES AND CHALLENGES 29, 35, 39 (Carsten Sorensen et al. eds., 2005) (noting that mobile technologies both empower and enslave users and blur the boundaries between private and public space and communication); Amy E. Mickel & Elise J. Dallimore, *Life-Quality Decisions: Tension-Management Strategies Used by Individuals When Making Tradeoffs*, 62 HUM. REL. 627, 628 (2009) (discussing the different options for decreasing the work-life conflict that stems from the increasing work demands and the blurring of personal and professional boundaries); JULIET B. SCHOR, THE OVERWORKED AMERICAN: THE UNEXPECTED DECLINE OF LEISURE 36 (1993) (providing statistics indicating that over a twenty year period Americans have experienced a decrease in leisure time and an increase in work time).

140. Mazmanian, Yates & Orlikowski, *supra* note 7 (noting that the absence of a clear markers leads to asking the question “[w]hen is it work time?”); see *The BlackBerry Backlash*, ECONOMIST, June 25, 2005, at 58 (describing as a “particular challenge” the fact that users must decide for themselves “when to use [the BlackBerrys] for work and when not to”).

work-life time segmentation.<sup>141</sup> As the “interface of personal and professional domains is competitive and conflicting,” this interface affects the employee negatively through “increased stress and anxiety, work interference with family [life], family [life] interference with work, absenteeism, lower life and job satisfaction, and higher turnover intentions.”<sup>142</sup>

*B. Benefit to the Employee from Smartphone Off-the-Clock Use*

Although there are negative implications associated with off-the-clock smartphone use, smartphones also afford favorable opportunities to the employees who use them. Courts should give great weight to the benefits derived by employees from off-the-clock smartphone use.<sup>143</sup> The benefits that should be taken into account are: (1) the employee’s convenience in monitoring work information; (2) the employee’s increased work performance; (3) the flexibility afforded to the employee to work from any location; and (4) the employee’s ability to use the smartphone for personal use.

Courts should consider the convenience afforded by the off-the-clock smartphone use to the employee. “[C]arrying a BlackBerry offers the opportunity to monitor information flow, [as well as] . . . to control the form of information delivery and receipt.”<sup>144</sup> An employee using a smartphone is able to check her e-mails in a fast and convenient manner and to screen those e-mails she does not want to respond to by glancing at the sender and subject line information.<sup>145</sup>

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141. Mazmanian, Yates & Orlikowski, *supra* note 7 (mentioning that the negotiation of time segmentation depends on individual desires, group expectations, job demands, and the properties of the new communication medium); *see* Porter, *supra* note 6, at 6 (recognizing that “[a] very high percentage of respondents preferred work segmentation (clear boundaries between work and nonwork) rather than integration (permeable boundaries so that work and nonwork commingle)”).

142. Mickel & Dallimore, *supra* note 139, at 630 (citing Stella E. Anderson, Betty S. Coffey & Robin T. Byerly, *Formal Organizational Initiatives and Informal Workplace Practices: Links to Work–Family Conflict and Job–Related Outcome*, 28 J. MGMT. 787, 788 (2002)).

143. *See* Mazmanian, Yates & Orlikowski, *supra* note 7 (mentioning that while the BlackBerry offers individual opportunities, its use also carries negative implications).

144. *See id.*

145. *Id.* (indicating that being exposed to the flow of incoming e-mail messages does not necessarily mean interacting with the messages, but gives the employee the opportunity to “keep an eye on” the e-mails that her employer is sending her); *see* Greg LaRose, *BlackBerry Jungle*, LONG ISLAND BUS. NEWS, June 24, 2005, at 1B, 6B (describing the

Courts should also scrutinize the effect of off-the-clock smartphone use on the employee's work performance. Studies have shown that using a smartphone off-the-clock has also the effect of enhancing employee job performance by allowing the employee to convert downtime into productive time through twenty-four hour e-mail access.<sup>146</sup> In addition, the device provides a "[l]ocation-based work extension," giving the employee the opportunity to work from anywhere, be that a train, a bus, or a taxi.<sup>147</sup> The flexibility to work from any location is described by some employees as a "means of controlling the work environment to better fit personal needs."<sup>148</sup>

Furthermore, courts should consider whether the employer has given the employee the opportunity to use her work-issued smartphone to make personal calls and send non-work related e-mails.<sup>149</sup> Being able to use a work-issued smartphone for personal use results in the employee saving

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benefits of being able to respond to e-mail messages instantaneously through the BlackBerry).

146. See Alan Livingston, *Smartphones and Other Mobile Devices: The Swiss Army Knives of the 21st Century*, 2 *EDUCAUSE Q.* 46, 47 (2004) (describing how "web-enabled mobile devices help users become more effective, providing a variety of tools for different purposes"); Middleton, *supra* note 6, at 170 (describing BlackBerry users as praising the device for "intensify[ing] their working practices, so that they could accomplish additional tasks within the traditional time and space confines of their jobs"); Porter, *supra* note 6, at 21 (concluding that the majority of people will say that use of smartphones enhances job performance); Ipsos Reid, *Research Study: Analyzing the Return of Investment of a BlackBerry Deployment*, BLACKBERRY.COM (2007), [http://www.blackberry.com/downloads/wes\\_presentation/Analyzing\\_ROI\\_of\\_a\\_BlackBerry\\_Deployment-2007.pdf](http://www.blackberry.com/downloads/wes_presentation/Analyzing_ROI_of_a_BlackBerry_Deployment-2007.pdf) (ninety-six percent of the respondents of the study agreed that carrying a BlackBerry made them more productive). *But see* Karen Renaud, Judith Ramsey & Mario Hair, "You've Got E-Mail!". . . Shall I Deal With It Now? *Electronic Mail From the Recipient's Perspective*, 21 *INT'L J. HUMAN-COMPUTER INTERACTION* 313, 313 (2006) (arguing that "the constant monitoring of e-mail actually reduces productivity").

147. Middleton, *supra* note 6, at 171-72.

148. *Id.* at 172 (indicating that the routine to "work anytime and anywhere reflect organizational cultures that value immediacy, and responsiveness").

149. See Jennifer Stisa Granick & Kurt Opsahl, *Your Boss and Your BlackBerry: Taking Reality Into Accounts*, N.Y. TIMES (Dec. 21, 2009, 9:44 AM), <http://roomfordebate.blogs.nytimes.com/2009/12/21/your-boss-and-your-blackberry/> (indicating that "separate phones and computers for work and personal matters are no solution because it's simpler and more efficient to have just one device"). *But see* Sewell Chan, *City Workers Are Warned About Personal BlackBerry Use*, N.Y. TIMES (Feb. 7, 2008, 5:41 PM), <http://cityroom.blogs.nytimes.com/2008/02/07/city-workers-are-warned-about-personal-blackberry-use/> (describing the holding of the New York City Conflicts of Interest Board Decision that city employees may use their BlackBerrys for personal communications only if they keep careful track of such activity and reimburse the city for it).

money by not having to buy a personal cell phone.<sup>150</sup> However, an employee who is allowed to use the same device for personal and work-related communications should understand her employer's policies addressing the employee's privacy rights before giving up her personal cell phone.<sup>151</sup>

In sum, it is only by examining the burden on the employee and the benefit to the employee from smartphone off-the-clock use, that the courts will be able to make a just and comprehensive decision when analyzing smartphone overtime claims.

#### IV. AVOIDING SMARTPHONE OVERTIME LITIGATION

Smartphone overtime claims are a new occurrence in the legal world.<sup>152</sup> Moving forward, courts will have to adopt a new overtime framework.<sup>153</sup> However, smartphone overtime litigation can be prevented and this Part proposes ways in which employees and employers can avoid smartphone overtime lawsuits. This Part examines the options that employees have in avoiding smartphone overtime litigation—such as refusing to use the smartphone off-the-clock for work purposes or asking the employer for the delineation of off-the-clock smartphone use, and argues that employers should implement smartphone use policies that are efficient and enforceable to avoid overtime litigation.

##### A. *Employee's Options: Refusal or Limited Use*

What can an employee do who has been given a smartphone by his employer, was told that she has to use it after hours for work related communication, and is not being compensated for that time? An obvious remedy is litigation under the FLSA overtime provision to recover lost

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150. See Joe, *8 Reasons to Get Your Employees a BlackBerry*, BBGEEKS (Sept. 11, 2008), <http://www.bbgeeks.com/blackberry-issues/8-reasons-to-get-your-employees-a-blackberry-88633/> (describing an employee who saves money as a happy employee).

151. See Jonathan Zittrain, *Your Boss and Your BlackBerry—Total Monitoring on the Web*, N.Y. TIMES (Dec. 21, 2009, 9:44 AM), <http://roomfordebate.blogs.nytimes.com/2009/12/21/your-boss-and-your-blackberry/> (indicating that in the private sector there is not much workplace privacy unless the employee uses her own equipment and network and that “employers can redraft their handbooks to give themselves as much latitude as possible in snooping on employees”); see also *City of Ontario v. Quon*, 130 S. Ct. 2619, 2633 (2010) (holding that city's review of an officer's text messages on a city provided pager was reasonable and did not violate the officer's Fourth Amendment rights).

152. See *supra* Introduction.

153. See *supra* Part III.

wages, liquidated damages, and attorneys' fees.<sup>154</sup> However, with unemployment being at the high rate of almost ten percent,<sup>155</sup> employees might feel uncomfortable suing their employer and jeopardizing their job security. Most likely, complaints about unpaid smartphone overtime will emerge from disgruntled employees or laid-off employees.<sup>156</sup>

A solution for an employee who is given a smartphone is to ask her employer to specify how many hours the employee is expected to use the smartphone after hours and to keep an appropriate record of those hours for the purpose of being compensated. Another option is, of course, to refuse to use the smartphone after hours or to leave the smartphone in the office.<sup>157</sup> However, this option might not seem convenient to the employee as it might jeopardize her job security or promotion potential.<sup>158</sup>

#### B. Employer's Options: Smartphone Use Policies

To maintain compliance with the FLSA overtime provision and to prevent wage-and-hours claims regarding off-the-clock smartphone use,<sup>159</sup>

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154. Litigation regarding claims for smartphone overtime use is a new issue and most claims are still pending, so there has not been any recovery for lost wages so far. However, if plaintiffs succeed in these lawsuits, wage recovery for overtime could be sizeable. For example, in 2008, the U.S. Department of Labor's Wage and Hour Division (WHD) collected more than \$185 million dollars in back wages for overtime. *See* News Release, U.S. Dep't of Labor, U.S. Department of Labor's Wage and Hour Division Collects More Than \$185 Million Wage Recovery for FY 2008 (Jan. 2, 2009), <http://www.dol.gov/opa/media/press/esa/archive/esa20090001.htm>. Since 2001, the WHD has recouped more than \$1.4 billion back wages for over two million workers. *Id.* Furthermore, employees who are not paid overtime are entitled to recover the amount of their unpaid overtime compensation and an additional equal amount as liquidated damages. *See* 29 U.S.C. § 216(b) (2006).

155. News Release, U.S. Bureau of Labor Statistics, The Employment Situation—October 2010, <http://www.bls.gov/news.release/pdf/empisit.pdf>.

156. *See* Baldas, *supra* note 11, at 6.

157. *See generally* Shirley Lung, *Overwork and Overtime*, 39 IND. L. REV. 51 (2005) (discussing employees' right to refuse overtime work).

158. *See* Porter, *supra* note 6, at 6 (indicating that when asked whether it was acceptable to decline the offer of an employer-supplied device, only about one third of the respondents of the study thought that it could be done "without jeopardizing one's current position or one's promotion potential, [while] nearly half did not know whether there was jeopardy attached to declining").

159. While off-the-clock smartphone use raises the concern of overtime liability, there is also the potential employer tort liability associated with the off-the-clock employee use of smartphone while driving; for example, if there was an automobile accident caused by an employee checking her e-mails. *See* Middleton & Cukier, *supra* note 6, at 255; *see also* Ola

companies should scrutinize their wage-and-hour policies to implement smartphone use policies that are efficient and enforceable. As a first step, a company should conduct an internal wage-and-hour audit or work with an employment counsel to ensure that it is properly classifying its current employees into the exempt and non-exempt categories. An improper classification could cost a company a lot of money.<sup>160</sup>

Giving smartphones only to exempt employees who are not covered under the FLSA overtime provision could be another policy.<sup>161</sup> On the one hand, this policy might not be feasible because many employees check and use their smartphones after hours and are not exempt under the FLSA overtime provision.<sup>162</sup> On the other hand, “[t]his approach, while drastic for some companies, virtually ensures that a company is able to accurately track all working hours by nonexempt employees.”<sup>163</sup>

Another option would be to ban employees from using their smartphones after authorized work hours.<sup>164</sup> This option, however, defeats the purpose of providing employees with smartphones, as most of the time employees are given smartphones by their companies with the precise expectation that they will be using the devices after hours.<sup>165</sup>

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Svenson & Christopher J.D. Patten, *Mobile Phones and Driving: A Review of Contemporary Research*, 7 COGNITION, TECH. & WORK 182, 182 (2005) (studying the effects of using a mobile phone while driving).

160. See *Beware of the Thorns in the BlackBerry Patch*, *supra* note 11 (discussing the financial impact of smartphone overtime claims).

161. See *supra* Part I.A (discussing exempt and non-exempt employees). Employers should be aware that “to maintain the exempt status of an employee, the employee must be paid his or her full salary for any week in which he or she performs any work.” Schlossberg & Malerba, *supra* note 2, at 13. An issue might arise when a company has an exempt employee who is on unpaid leave. *Id.* Also, if the employee checks her BlackBerry for work-related calls for more than a *de minimis* amount of time, the employee would be entitled to be paid to protect the exemption. *Id.*

162. An estimated nineteen to twenty-six million full-time wage and salary workers were covered by the white-collar exemption in 1998. See U.S. GEN. ACCOUNTING OFFICE, *supra* note 21, at 8 (indicating that the number represents twenty to twenty-seven percent of the full-time labor force).

163. Carrie B. Rosen, *United States: Wage and Hour Issues in the Blackberry Era*, MONDAQ BUSINESS BRIEFING (May 30, 2009), <http://www.mondaq.com/unitedstates/article.asp?articleid=79978>.

164. Alternatively, employers might prefer to limit non-exempt employees to spending only a *de minimis* amount of time using their smartphones after hours. See Schlossberg & Malerba, *supra* note 2, at 13. However, since there is no clear-cut rule as to what courts regard as *de minimis*, it would be risky for an employer to adopt such a policy. See *supra* Part I.D (discussing the *de minimis* analysis).

165. See Porter, *supra* note 6, at 5; see also *supra* note 7 and accompanying text.

Some companies might find it preferable to require that employees get permission first before using their smartphones after work hours.<sup>166</sup> The employer can set beforehand the number of hours that the employee is allowed to use her smartphone for work related purposes and this way authorize limited overtime compensation. This policy involves requiring employees to keep track of the time they spend reviewing or responding to e-mails outside of normal working hours.<sup>167</sup> In this situation, however, the employer must rely on the honesty of the employee, who can always claim that she worked more overtime hours than she actually did.

For the purpose of keeping track of time, it is essential that employers ensure that the company policy clearly states that employees must report all time spent using a smartphone after hours and that failure to do so could result in discipline.<sup>168</sup> In the case of a policy whose violation would result in an employee's disciplining, the employer should have a procedure in place for enforcing that policy.<sup>169</sup> However, it is important to note that "[a]n announcement by the employer that . . . overtime work will not be paid for unless authorized in advance, . . . will not impair the employee's right to compensation for compensable overtime hours that are worked."<sup>170</sup>

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166. See Baldas, *supra* note 11, at 6; Doug Weiner & Frank Morris, Jr., *Amid Tough Times, Furloughs Can Save Employers Money and Employees Jobs*, WAGE & HOUR DEFENSE BLOG (Apr. 29, 2009), <http://www.wagehourblog.com/2009/04/articles/white-collar-exemptions-genera/amid-tough-times-furloughs-can-save-employers-money-and-employees-jobs/> (indicating that a "good practice [is] to give employees clear notice specifying that no 'volunteer work' is permissible and no work is to be performed unless specifically authorized by a predetermined schedule or authorization by an appropriate manager").

167. While the employer can require the employee to keep accurate records of the time spent working, according to regulations, it is ultimately the employer's duty and responsibility to keep accurate records of all time worked by non-exempt employees. See 29 C.F.R. § 516.2(a) (2010).

168. See Banks & Boden, *supra* note 85.

169. See *id.*

170. U.S. Dep't of Labor, *Fact Sheet #23: Overtime Pay Requirements of the FLSA*, U.S. WAGE & HOUR DIV., <http://www.dol.gov/whd/regs/compliance/whdfs23.pdf> (last updated July 2008); see also 29 C.F.R. § 785.13 (2010) (indicating that an employer "cannot sit back and accept the benefits [of the employees' work] without compensating for them"); Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 302 (1985) (holding that an employer may not avoid its obligations under the FLSA upon proof that its employees voluntarily engaged in adequately compensated work); Chao v. Gotham Registry, Inc., 514 F.3d 280, 290 (2d Cir. 2008) ("[O]nce it is established that an employer has knowledge of a worker's overtime activities and that those activities constitute work under the [FLSA], liability does not turn on whether the employee agreed to work overtime voluntarily or under duress."); Schlossberg & Malerba, *supra* note 2, at 13 (indicating that while the employee is entitled to

## V. CONCLUSION

Employees who handle work-related e-mails, text messages, and telephone calls after hours through their company-provided smartphones are presenting real claims for overtime compensation under the FLSA, and employers should be aware of that. In analyzing these claims, courts should not only look at the current standards for on-call time and time spent performing a preliminary or postliminary work activity, but should also consider the burden on and the benefit to the employee from off-the-clock smartphone use. Only by embracing this new overtime framework will courts be able to make a proper decision regarding smartphone overtime claims.

Furthermore, to preempt smartphone litigation, it is important for employees to ask for guidance from their employers regarding off-the-clock smartphone use and for employers to implement workplace policies that regulate employee smartphone use. Through the adoption of policies that are “workable, capable of recording all time worked, and uniformly enforced,” employers “can reap the benefits from the ever increasing high-tech world rather than the risk.”<sup>171</sup>

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overtime compensation even if she was not authorized to work overtime, the employer always has the option of disciplining the employee for violating the company’s policy).

171. Schlossberg & Malerba, *supra* note 2, at 13.