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Smartphone Overtime: The FLSA Knows No Bounds

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Special to the Legal

The advent of remote connectivity has fundamentally changed the landscape of the American workplace and increased the potential wage-and-hour risks for employers. Modern technology, such as smartphones and virtual private networks (VPNs), provides many workers with the flexibility to conduct business from anywhere and at any time. A recent study by the Pew Research Center found that 45 percent of American adults own a smartphone, giving them access to email and the Internet at their fingertips on a 24/7 basis. The constant connectivity of today's American workforce could signal the end of the 9-to-5 work day as we know it and correspondingly could create the potential for enormous overtime pay liability for employers.

PRODUCTIVITY HAS COSTS

While a connected workforce certainly could result in a more productive and focused workforce, it also may become more costly. For many employers, allowing employees to remain connected to their work email during non-working hours could create significant legal risks when those employees are non-exempt workers under the federal Fair Labor Standards Act. The FLSA, like many state wage-and-hour laws, requires employers to pay all non-exempt employees at least the minimum wage for all hours worked. If a non-exempt employee works more than 40 hours in a given work week, the FLSA



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requires that the employer pay that employee an overtime rate of one-and-a-half times his or her regular hourly rate for all hours worked in excess of 40 for that work week.

Non-exempt employees are entitled to overtime pay for those hours worked over 40 regardless of whether the employer asked or required that the employee perform such work. If the employer had actual or constructive knowledge that the employee performed work that is an "integral and indispensable" part of the employee's principal job functions after regular hours, it must compensate the employee for that time, as in *Steiner v. Mitchell*, 350 U.S. 247, 256 (1956). Essentially,

employers are held responsible for "suffering or permitting" a non-exempt worker to work.

TIME-TRACKING RECORDS

Employers who provide (or allow) their non-exempt employees access to company email through either a company-issued or personal mobile device need to be vigilant about tracking the time their employees spend working on or via these devices during non-working hours. Employees who spend time checking and responding to email on their smartphones after work or on the weekends are indeed doing work and likely need to be compensated for this time, unless the amount of time the employee spends checking the emails is de minimis. While there is no bright-line rule to determine what is considered de minimis, courts have found that work that takes less than 10 minutes to perform is de minimis and does not count as hours worked for overtime purposes.

CLASS-BASED LAWSUITS

Recently, several major corporations, including T-Mobile, Verizon, Black & Decker and LoJack, have felt the sting of FLSA collective actions brought by non-exempt employees, on behalf of themselves and all those "similarly situated," claiming that their employers failed to compensate them for after-hours work performed using mobile devices. In January, a federal court in Illinois granted conditional certification for a collective action brought by a Chicago police officer who claims he and his fellow officers were not compensated for time spent regularly check-

ing and responding to email on a department-issued smartphone, in *Allen v. City of Chicago*, Case No. 10-3183 (N.D. Ill.). The plaintiff, Henry Allen, claims that checking and responding to email while off-duty was a requirement of his job and that he was never compensated for this time. That case is still pending, but the likelihood of success has increased tremendously. Where collective actions arise against employers with hundreds or thousands of employees, the potential liability can grow exponentially, and the plaintiffs attorney fees become enormous and extremely relevant under a fee-shifting statute such as the FLSA.

MINIMIZING RISK

The best course of action for employers seeking to avoid these types of FLSA overtime claims is to develop and implement a policy establishing that the company does not issue smartphones to non-exempt employees (or allow them access to the company's email, for example, via their own personal smartphones) and does not provide remote access through a VPN to its non-exempt employees. However, such a policy may not be practical, or desired, by many employers.

An alternative, and perhaps more practical, method to minimize the wage-and-hour risks associated with non-exempt employees' after-hours work-related use of smartphones is for the employer to establish and clearly communicate the parameters for the employee's use of company-issued or personal devices to access work email systems. Employers must create a clear, written policy setting forth exactly how and when company systems and email may be accessed using smartphones and VPNs, and then communicate this policy to its employees. All remote-access policies should require that non-exempt employees document and report all of their hours worked, including any time they spend

reviewing and responding to work-related email and working remotely from home.

While requiring (and monitoring) employee self-reporting is a critical aspect of FLSA compliance, employers must also take proactive measures to track any off-duty, remote work performed by their non-exempt employees. To ensure that employees comply with any remote-access policy that is implemented, employers should track their non-exempt employees' usage of smartphones and VPN access for business-related purposes during non-working hours. Additionally, if the employer allows employees to access their work email from their own personal mobile devices, then the employer should monitor the emails that the employees send during non-working hours to ensure that these emails are not work-related.

TRAINING AND EDUCATION

Employers must also train their entire staff, exempt and non-exempt employees alike, on the relevant policies and the proper use of mobile devices for business-related purposes. In addition to being advised of the company's policy, non-exempt employees should be trained on the proper procedures for using mobile devices for business purposes during non-working hours (and, of course, be trained on the proper procedure to report such time worked).

Exempt employees, especially those who supervise non-exempt employees, should be trained on the proper procedures for communicating with non-exempt employees, either by telephone or email, during non-working hours. If a supervisor requests that a non-exempt employee respond to an email or participate on a telephone call for business purposes during non-working hours, the supervisor should be trained to document this request and confirm that the employee was properly compensated for this working time.

To be effective, a remote-access policy must be clearly drafted, communicated to all employees and consistently enforced by the employer. If non-exempt employees work remotely during non-working hours without prior approval from their supervisors, they should be disciplined for violating the policy but should receive the proper pay for the actual hours worked. Although they may be disciplined, the employer must still pay the employees for the time worked. Similarly, if a supervisor requires a subordinate to respond to email during non-working hours, then the supervisor must also be disciplined if such an action violates the remote-access policy.

Mobile device connectivity is not a fleeting fad but, rather, is here to stay and will become more and more commonplace. With the tedious and technical requirements of the FLSA (and state wage-and-hour laws), the potential liabilities that lurk in the alleys of the workplace are growing exponentially in the wage-and-hour legal sector. Remote access via personal or company-issued mobile devices is only one aspect of an ever-growing thorn in the side of employers. However, it is one issue that truly lends itself to the core tenets of solid employment counseling: understand the nature of the issue, develop and implement a written policy to minimize legal risk, educate and train the workforce and consistently follow and enforce the policy. Failing to follow such a basic risk-management tenet will only lead to an extremely costly wage-and-hour class-based lawsuit. •