

UPDATE

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EMPLOYERS BEWARE: DON'T ATTRACT WAGE AND HOUR LAWSUITS WITH SMARTPHONES

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Did you know that supplying your employees with technology that allows them to respond to work e-mails and telephone calls outside of working hours may lead to increased exposure to wage and hour lawsuits? Under the Obama Administration, the U.S. Department of Labor (“DOL”) is stepping up enforcement of wage and hour laws. The employer trend of providing non-exempt employees with technology that allows these employees to stay in touch with work outside of their regularly scheduled hours has made employers vulnerable to wage and hour violations. Wage and hour violations can result in big legal bills and verdicts against employers.

As an employer, it is important that you understand the legal implications of supplying your employees with technology they can use outside of their regularly scheduled hours. This Alert discusses the legal implications of work-issued cellular telephones, smartphones, and similar technology and provides you with basic strategies to prevent exposure to wage and hour lawsuits resulting from employee use of these technologies.

Following criticism of the DOL’s lax enforcement of wage and hour laws, the DOL is hiring 250 additional wage and hour investigators. This means employers should expect more in-person investigations and more thorough investigations on wage and hour issues. This is concerning news for employers, as wage and hour litigation can prove to be very costly. Wal-Mart, for example, lost a \$78 million jury verdict in Pennsylvania in 2006 for off-the-clock work and unpaid rest breaks.

While employers generally understand the basic requirements of wage and hour laws, legal landmines arise in situations where it is not entirely clear whether or not an employee is working or not working. Previously, the time an employee spent preparing for work (i.e., getting dressed at work, etc.) was a legal grey area that resulted in wage and hour litigation.

Now, as technology becomes cheaper and employers become more apt to hand it out to their non-exempt employees, time spent using these technologies is becoming the new focus of wage and hour litigation. Plaintiffs’ lawyers are seizing upon this legal grey area and filing class action lawsuits against employers. For example, last month, three employees sued T-Mobile USA, Inc., for wage and hour violations claiming they were required to use company-issued smartphones to respond to work messages after hours without pay and without proper allocation toward overtime. Earlier this year, a former CB Richard Ellis Group, Inc., maintenance worker filed suit for time spent after hours receiving and responding to messages on a work-issued cellular telephone.

The federal Fair Labor Standards Act requires employers to pay employees for work performed off-the-clock. While employers are not required to compensate employees for de minimus time, time spent using smartphones and the like is not necessarily de minimus.

Here are steps you can take to prevent your non-exempt employees’ use of remote technology from becoming more problematic than productive:

- Institute a policy that requires your employees to obtain approval for all overtime logged (including use of remote technology), and which requires your employees to notify you if they think they are using their remote access technology for work outside of working hours. By doing so, you are shifting the onus from you to them.
- Ensure that managers understand that requiring employee accessibility off working hours may implicate wage and hour laws, and that overtime spent on what could be considered off-hours should be accounted for in work schedules or budgets associated with overtime pay.
- Make sure that employees who need to be accessible (i.e., nurses, IT personnel) are reminded to limit calls taken during off-hours to the extent possible and to track and report any time spent on calls that is not de minimus so that either (1) adjustments can be made to work schedules for the upcoming week, or (2) such time is paid as overtime.
- Specifically advise employees who do not need to be accessible after work hours that remote access technology should be turned off at the end of the work day.