Employees' Use of Smart Phones and Home Computers Increases Wage and Hour Risks

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There has been a considerable increase in the number of Fair Labor Standards Act (FLSA) lawsuits filed in recent years. Over the last decade, while the number of cases filed in federal courts has remained relatively constant, the number of federal FLSA lawsuits has quadrupled.[i] This trend shows no signs of slowing down. There were approximately 60 more lawsuits filed under the FLSA in the twelve months ending March 2012 than in the twelve months ending March 2011.[ii]

As a result, savvy employers are well advised to keep up with potential risks and trends in FLSA litigation. One potential trend relates to non-exempt employee use of smart phones or computers to perform work outside of regularly-scheduled work time.

The FLSA requires employers to pay non-exempt employees for all hours worked. The FLSA requires employers to pay for any work that they "suffer or permit," even if such work is not specifically authorized by the employer. Thus, if an employer knows or has reason to know that work is being performed by a non-exempt employee, the employer must pay for such work — even if the work was not required, authorized, or directed by the employer. So-called "off the clock" claims — claims in which the employees allege that they performed work "off of the clock" and were never paid for it — are filed regularly in courthouses all over the country.

Employers may begin to see a new type of "off-the-clock" claim filed more regularly in the near future. In today's business world, more and more work is done electronically and via e-mail, and more and more employees carry smart phones or have home computers through which they can log onto their employers' computer systems. It is not uncommon for employees to check and/or respond to work e-mails at night or during weekends, outside of regularly-scheduled working time. Some employers may regard such after-hours work and connectivity as a positive, and other employers may expect their employees to stay connected, and to respond to work-related e-mails, after regularly-scheduled working hours. Indeed, some employers may provide smart phones to their employees specifically because they expect them to stay connected after hours.

However, if non-exempt employees perform after-hours work, they must be paid for their working time, and if an employer (or an agent or supervisor of the employer) knows or has reason to know that an employee is working after hours, that employer must pay the employee for the working time. Thus, for example, if a non-exempt employee regularly sends work-related e-mail to her supervisor after hours, the supervisor "knows" – or at a minimum "has reason to know" – that the employee is performing work. Thus, the supervisor is "suffering or permitting" the work, and the employee must be paid for it.

Indeed, over the last few years employees have brought a number of collective actions under the FLSA alleging that their employers failed to pay them for their time working after hours on their personal data assistants (PDAs). For instance, in Rulli v. CB Richard Ellis Inc., a group of hourly maintenance employees brought a collective action alleging that their employer violated the FLSA by failing to pay them and other similarly-situated, non-exempt employees for their off-the-clock use of company-issued BlackBerrys. Likewise, in Agui v. T-Mobile, a group of sales representatives brought a collective action alleging that their employer violated the FLSA by failing to pay them for their off-hours review of, and response to, work-related e-mails and text messages. Both of those cases settled pursuant to confidential settlement agreement. More recently, in Allen v. City of Chicago, a Chicago police sergeant filed a collective action alleging that the City of Chicago violated the FLSA by requiring him and other similarly-situated, non-exempt employees to use PDAs outside their normal working hours without

receiving any compensation for such hours. That case is still pending.

Given this trend in case filings, employers should take care with respect to non-exempt employees' use of smart-phones and home computers. Employers have options, but unfortunately none are simple to administer. One such option is to prohibit non-exempt employees from accessing the employer's network, and from responding to e-mail or other messages, during non-scheduled time. However, such a policy would have to be strictly enforced and managers would have to be trained to recognize potential violations of the policy. Furthermore, an employer's provision of smart-phones to non-exempt employees could be considered to be inherently inconsistent with a policy of non-use during non-scheduled time.

At the other end of the spectrum, employers could allow non-exempt employees to respond to e-mails and other messages during non-scheduled time, but require employees to accurately report such working time to the employer. Again, the key would be communication of the policy, training on the policy, and enforcement of the policy. In particular, supervisors would need to be trained to recognize situations in which employees were working from home but failing to properly record their time.

Alternatively, employers could require non-exempt employees to receive authorization prior to performing any work (even as simple as responding to an e-mail) during non-scheduled time. Again, however, the employer would have to effectively communicate and enforce such a policy, and supervisors would have to be trained to recognize violations.

At the end of the day, there is unfortunately no easy answer. As a result, employers should contact their legal counsel and discuss the best way to handle this thorny issue under the facts and circumstances attendant to their individual businesses.

About the author: Mark Knueve is a partner in the Vorys, Sater, Seymour and Pease Columbus office and a member of the labor and employment practice group. He represents primarily employers and assists them in litigation matters, focusing on complex employment litigation such as wage and hour class actions and collective actions.

[i] Avran, R.D. & Rosenberg, M.T., *Independent Contractor Misclassifications Hold Many Risks*, Society for Human Resource Management Legal Report. (July 2012).

[ii] Rubenstein, Abigail, *New FLSA Suits Hit Record High in 2012, Report Says, Law360* (July 23, 2012).

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