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WAGE AND HOUR

Mobile Workforce Creates Breeding Ground for Wage-and-Hour Risk

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For today's connected workforce, the ability to do work anytime, anywhere is invaluable. Yet allowing non-exempt employees to perform work at home or other remote locations is fraught with legal risk. In fact, whenever non-exempt employees use employer-provided devices out of the office, it engenders thorny questions such as when the compensable workday began, and whether even commuting time might potentially be compensable. Employee "freedom" wrought by technology has created new legal challenges for employers in the form of wage-and-hour risks on multiple fronts. The rising tide of wage-and-hour litigation, coupled with the rapid growth of an increasingly technological and interconnected workforce, means that remote work off-the-clock claims may well be the next frontier in wage-and-hour litigation.

SHIFTING LEGAL AND REGULATORY LANDSCAPE

In deciding that telecommuting may be a reasonable accommodation under the Americans with Disabilities Act (ADA), the U.S. Court of Appeals for the Sixth Circuit in *Equal Employment Opportunity Commission v. Ford Motor*, No. 12-2484 (6th Cir. Apr. 22, 2014), recently noted that "the law must respond to the advance of technology in the employment context, as it has in other areas of modern life, and recognize that the 'workplace' is anywhere that an employee can perform her duties." However, the dispersion where work can be performed does not alleviate the obligation of employers under the Fair Labor Standards Act (FLSA) and its state counterparts to pay for time "suffered or permitted" to work, including time-and-a half for hours worked over 40 in a workweek. Indeed, technology can make it far more challenging for employers to navigate the minefield of wage-and-hour compliance.

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Mix the changing technology landscape with the shifting legal landscape and it truly may be a perfect storm for employers. The Sixth Circuit's decision is of note because it suggests that remote work arrangements may be required under certain circumstances for employers to comply with their affirmative obligations under the ADA to provide reasonable accommodations.

There looks to be more on the legal horizon coming from the U.S. Department of Labor (DOL). On March 13, President Obama issued a Presidential Memorandum directing the secretary of Labor to propose revisions to the FLSA's overtime regulations. The memorandum specifically references the weekly salary requirements for the "white collar" exemptions that exempt employers from paying overtime if workers fit into a specific exemption such as the "executive" or "administrative" exemption. Should the salary requirements (which currently stand at $455 per week, equating to $23,660 per year) increase, thousands of additional employees may be eligible for overtime pay.

Employers then are faced with an increasingly technological world where work can be performed untethered to a specific physical location, they are legally obligated to provide remote work opportunities under the ADA in certain circumstances, and there is a regulatory framework that may cause many more employees to be non-exempt, and therefore eligible for overtime. As technology continues to advance, and given the larger forces at play, it is essential for employers to appreciate the impact of shifting workplace dynamics on their efforts to reduce the risk of wage-and-hour litigation.

THE CHALLENGES PRESENTED BY MOBILE TECHNOLOGY

While many employers take the approach that non-exempt employees should not be provided with smartphones or

remote access as a means of trying to reduce wage-and-hour risk, that approach certainly has business consequences. On July 23, the U.S. House of Representatives Subcommittee on Workforce Protections held a hearing on "Improving the Federal Wage-and-Hour Regulatory Structure." At the hearing, a representative appearing on behalf of the Society for Human Resource Management spoke about the decision of her organization not to provide smartphones to non-exempt employees "because of the difficulties associated with tracking these after-work hours" even though providing smartphones to certain non-exempt employees would provide them greater flexibility to perform their duties.

Moreover, given the omnipresence of cellphones, smartphones and tablet computers, many non-exempt employees may have the ability to work remotely using their own equipment even where an employer chooses not to provide the equipment itself. This of course creates not only wage-and-hour risk, but also presents a risk to confidential information.

The FLSA creates a constructive knowledge standard, asking whether an employer knew or had reason to know that its non-exempt employee was providing more than de minimis work and not being paid for his or her efforts. Although it is impossible to police all communications, it is essential for all employers to put in place comprehensive policies regarding remote work, and provide managers and employees alike with wage-and-hour training. Employers also should maintain records that employees were trained on wage-and-hour policies and certifications that employees are aware of all wage-and-hour policies. Training, coupled with a robust reporting and complaint system, is the first line of defense to decrease wage-and-hour risk.

Speaking of policing, a group of Chicago police officers were granted conditional certification in a case alleging that the officers, who were provided with employer-issued BlackBerries, performed work on their electronic devices and were not compensated for that time. While the police department maintained a written policy to compensate its police officers, the plaintiffs argued that there was an "unwritten practice" requiring the officers to check their BlackBerries and respond during off-shift hours. More than four years after that case was filed, it continues to be litigated.

THE CONTINUOUS WORKDAY?

With technology comes a blurring of the lines between work and non-work time, and under certain circumstances it can be challenging to determine when a non-exempt employee's workday begins. This is significant because the DOL has promulgated a "continuous workday rule," which provides that periods of time between the commencement of an employee's first "principal activity" and the completion of his or her last "principal activity" on any workday must be included in the computation of hours worked. Relying on this rule, plaintiff-employees successfully have argued in some instances that they should be paid for commuting time that occurred after non-exempt employees engaged in their first principal activity (for example, taking a call for 10 minutes before leaving for work).

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To assess whether an activity begins the continuous workday, recent case law has turned on whether preliminary and postliminary activities are necessarily contiguous to the principal activities of the workday. So, for example, if employees are required to upload or download information immediately before leaving on a day of customer meetings, then the DOL would take the position that the employees' continuous workday began before leaving home, and any time spent commuting would be compensable. In contrast, if employees could download the information at any point after the end of one workday and the start of another, while the time spent downloading would be compensable, it would not begin the continuous workday.

WHAT CAN EMPLOYERS DO?

Employers should be proactive in managing the challenges created by a technological workforce where workers are increasingly performing duties outside of "brick-and-mortar" offices. Prior to providing non-exempt employees with devices like iPhones or tablets, or offsite access through a provider like Citrix, employers should assess whether the work-related benefits outweigh the wage-and-hour risks and, if so, put a plan in place for mitigating against the chance of off-the-clock claims.

In addition to developing a comprehensive policy regarding remote work involving non-exempt employees (whether through employer-issued electronic devices or otherwise) and providing routine training on that policy both to managers and non-exempt employees, employers can implement various measures to try to mitigate against the risk of wage-and-hour litigation. Some options include requiring non-exempt employees to certify on a periodic basis that they are being paid for all time worked. Employers also should consider wage-and-hour audits to measure compliance.

Thoughtful implementation of policies and the creation of contemporaneous records documenting compliance efforts hopefully will serve as the ounce of prevention that will avoid the need for a pound of cure. •