

YOU'VE GOT MAIL

Working Together

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At Pullman & Comley's seminar regarding Developments in Labor & Employment Law last month, attendees at one of the breakout sessions were made aware of a study concerning a recent social and technological phenomenon, that should remind every employer of the importance of properly classifying its workforce as exempt, or non-exempt, under the Fair Labor Standards Act (FLSA), and adopting and enforcing modern working hour rules.

If you're like most people, you have a cell phone, and you probably check your cell phone fairly frequently. Also, if you're like most people who have a job that provides you with a work e-mail address, whenever you check your personal email your phone probably also informs you of e-mail messages sent to your business e-mail. If this picture seems familiar, the following study may give your business cause for concern.

Last year, the New York Post newspaper ran an article about a study done by a global tech protection and support company by the name of Asurion. That study found that Americans check their phones, on average, once every twelve minutes, or about 80 times a day. A later study by Qualtrics and Accel found that Millennials, on average, check their cell phones about 150 times a day. Among Millennials, 79% keep their phones nearby when they sleep, and half check their phone in the middle of the night. It is beyond the scope of this blog to address whether this phenomenon is healthy or unhealthy, but if these studies are accurate, any employer that is lax about allowing non-exempt employees to conduct business "digitally," outside of their 40-hour work week, needs to take corrective action.

Every employer covered by the FLSA must keep certain work records for each of its covered employees. Included among those records are records of the hours worked by the employees. Employers are required to preserve payroll records for at least three years. In addition to the rights and remedies available to persons through private suits for violations of the Act, e.g., back pay, liquidated damages, and attorneys' fees, the Department of Labor has a variety of remedies it can use to enforce compliance. Employers who willfully or repeatedly violate the minimum wage or overtime pay requirements can also be subject to civil monetary penalties for each violation.

Your company should already have policies or rules in place that prohibit a non-exempt employee from extending his/her work week by coming in early, or staying late, without a supervisor's overtime authorization. But what about employees who "digitally" access work files or respond to customer or coworker e-mails after hours? If your company does business in multiple time zones, the risk of digital overtime can be even greater. While after-hours dedication to the job may be esteemed and even expected

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among exempt employees, an employer's failure to curb the overly eager non-exempt employee may result in a finding that the Fair Labor Standards Act has been violated.

A prudent modern employer should check, not only to see if all its positions have been properly FLSA classified, but also to see if it has up-to-date workplace rules that restrict non-exempt employees from "digitally" exceeding 40 hours in a work week. Perhaps your IT Department can help you come up with a technological solution. Most would agree that consulting your legal and IT professionals to avoid litigation, is preferable to using these company resources to respond to discovery requests for records of how many times non-exempt employees logged on to their business account or exchanged e-mails with coworkers or clients - outside of working hours.

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