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The DOL's New App and the Dangers of Misclassifying Employees

The United States Department of Labor (DOL) recently launched a timesheet application for smart phones (app). The DOL describes this app as "a timesheet to help employees independently track the hours they work and determine the wages they are owed."^[1] The concept behind the new app seems harmless; the reality, however, is more complicated. When the app is viewed in light of the DOL's mission, public statements and actions, employers should view this app with something of a jaundiced eye. By creating its own app, the DOL has possibly demonstrated its implicit encouragement for employees to file wage and hour complaints against their employers.

The DOL app allows each user to track regular work hours, break times and any overtime hours that they work for multiple employers at any given time. The app can then create a precise spreadsheet showing the wage calculation for any specific period of time. The app even has a convenient function that allows the user to "email the summary of work hours and gross pay as an attachment." In addition, the app provides a "[g]lossary, contact information and materials about wage and hour laws through links to the Web pages of the department's Wage and Hour Division." According to Secretary of Labor Hilda L. Solis, "This app will help empower workers to understand and stand up for their rights when



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employers have denied their hard-earned pay."^[2]

The DOL app can also assist employees in tracking time worked while not on the employer's premises. Too often employers fail to account for the time their employees are working out of the office. With emerging technologies, employees are spending an ever-increasing amount of time responding to emails, text messages and the like. Of course, if these hours are not captured and compensated by the employer, then the employer could be on the hook for back pay as a result of any disparity between the employer's records and the employee's app reports.

The fact that the DOL devoted, and is devoting, significant resources to creating and maintaining this app sends a clear message that the DOL perceives that a substantial number of employers fail to keep accurate records and are misclassifying workers. In 2009, the United States Government Accountability Office (GAO) issued a report titled "Employee Misclassification" which calls for the DOL and the Internal Revenue Service (IRS) to prosecute more employers that misclassify workers as independent contractors rather than employees. The GAO report notes, among other things, that only three percent of employers who submitted a Determination of Workers Status Form (Form SS-8) resulted in a determination that the worker was properly classified as an independent contractor. The report also referenced a DOL commissioned study in 2000 finding "that 10 percent to 30 percent of firms audited in nine states misclassified at least some employees."^[3]

Accordingly, the DOL is encouraging workers to maintain a parallel and possibly even a secret set of records. Secretary Solis stated that the app's purpose is to ensure that "workers receive the wages to which they are entitled."^[4] The app underscores the need for employers to be vigilant in their record-keeping policies and practices. When employers fail to maintain accurate time records, the employee's records, including the records generated by using the app, become key evidence in a DOL investigation. The DOL will likely give substantial credence to the employee's parallel app records.

The app is only the latest development in the DOL's pursuit of wage violations and misclassifications. The

DOL recently partnered with the employment plaintiffs' bar to assist the DOL in suing employers for violations. The DOL deemed this "partnership" as the "Bridge to Justice." When introducing this "Bridge to Justice," Secretary Solis described it as "another tool [that employees] can use to ensure a fair and secure future." This "partnership" with the plaintiffs' bar was in addition to the "350 new [DOL] investigators."^[5] With the DOL's various "tools" in hand, wage and hour violations and misclassifications are going to be investigated and prosecuted.

Courts have also complicated wage matters by making it even more difficult for employers to determine whether a worker has been properly classified and to determine what test and what standards to apply. For example, a unanimous California Supreme Court recently ruled that California-based employers must pay out-of-state resident employees pursuant to the more restrictive provisions of the California Labor Code even if these employees visit the state on a limited, temporary basis. The Court held that California's overtime laws were intended to apply broadly to "protect" workers visiting California. The California Supreme Court held that California's labor code, including wage and hour statutes, can trump the laws from the states in which employees actually reside and primarily work.^[6]

Misclassifications of an employer's workforce will prove costly. Federal and state wage and hour laws allow for back wages, overtime, back benefits, penalties, back taxes and attorneys' fees. Under the Fair Labor Standards Act (FLSA), for example, the DOL can look back, in some cases, up to three years to determine back pay and damages.

Given the high stakes – and the technological watchdogs such as the DOL app – employers should consider taking several steps to ensure they are properly classifying and vigilantly maintaining accurate employment and payroll records. If there is a problem, or an employer thinks there might be a problem, there is no better time for an employer to conduct a self-audit than now. This audit should consider and look at several factors, including the following:

- Ensure that policies comply with federal and

state wage and hour laws.

- Ensure that all of the time employees spend providing services – including off the employer’s premises – are counted toward hours worked.
- Craft policies that have a requirement that if an employee’s time records – including records generated by the app – are different than the employer’s time records, that the worker is obligated to immediately report the disparity to ensure accurate payments.
- Craft overtime policies that explain and limit when non-exempt employees can work overtime.
- Craft and ensure that the record retention policy is accurate and that the records will be sufficient to withstand a dispute with an employee or the DOL.
- Evaluate all independent contractors and "exempt" employees to ensure they are properly classified under the multiple federal and state tests.
- Evaluate whether any employees have worked in California, even if temporarily, and ensure that California’s more stringent standards have been complied with.
- Ensure employees are not being allowed to work extra unrecorded hours by performing unrecorded work either outside of the workplace, at the workplace before or after their work day is scheduled to begin or end, or over an unpaid lunch hour.
- In California, ensure employees take any legally required meal and rest breaks.

When dealing with employment classifications and potential DOL audits, an ounce of prevention is worth, at least, a pound of cure.

Notes:

[1] *See* [Keeping track of wages: The U.S. Labor Department has an app for that! New timesheet app to help ensure workers receive all wages earned](#), (last visited August 1, 2011). [[Back](#)]

[2] *Id.* [\[Back\]](#)

[3] [Employee Misclassification: Improved Coordination Outreach, and Targeting Could Better Ensure Detection and Prevention](#), The United States Government Accountability Office; (Sept. 9, 2009) (last visited August 1, 2011). [\[Back\]](#)

[4] *Id.* [\[Back\]](#)

[5] [Hilda Solis, Secretary of Labor, Remarks at the Middle Class Task Force Event – Bridge to Justice](#) (Nov. 19, 2010) (last visited August 1, 2011). [\[Back\]](#)

[6] [Sullivan v. Oracle Corp.](#), No. S170577, California Supreme Court (June 30, 2011). [\[Back\]](#)

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