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Employers Who Permit After-Hours Work Should Exercise Caution in Light of an Anticipated Increase in Nonexempt Workers

Following the directive issued in March 2014 by President Obama, the U.S. Department of Labor published a proposed new rule in the *Federal Register* and is accepting comments through September 4, 2015. The new rule would extend overtime protections to nearly five million workers by raising the minimum salary threshold to $50,440 per year for employees to qualify for "white collar" exemptions in 2016, with automatic future adjustments. According to a 2013 report published by the Economic Policy Institute, in 2013 only 11 percent of salaried employees in the United States qualified for overtime pay. If enacted, the Department of Labor's proposed changes would raise the overtime salary ceiling for qualified employees to sweep millions of Americans into the overtime system.

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In the United States, the Fair Labor Standards Act (FLSA) establishes overtime pay standards whereby covered workers must generally be paid at least 1.5 times their regular pay rate for each hour of work per week beyond 40 hours. Salaried workers who earn below $455 per week, or $23,660 per year, are automatically eligible for overtime pay – regardless of the nature of their job or the duties they perform. Salaried workers who earn $455 per week or more can be exempted from the right to receive overtime if they fall into one of three categories: professionals, administrators or executives, referred to as the "white collar" exemptions. These categories are defined by — among many other things — job duties requiring the employee to exercise discretion and independent judgment in their work on matters of importance to the business, or a manager with a department and employees to supervise.

THE IMPACT OF TECHNOLOGY ON COMPENSATION AND LITIGATION UNDER THE PROPOSED RULE

While the U.S. Department of Labor is proposing a new rule to expand the number of employees who may receive overtime law protection, claimants' attorneys are focusing on employers who permit or encourage their employees to use smartphones to conduct business off the clock as potential defendants in claims for overtime pay. If both possibilities become a reality, more claims for overtime pay are likely to be seen in the future.

When the proposed rule is finalized, employers with an increase in nonexempt employees who are performing important business functions should consider the increasing complications in properly compensating these new hourly paid workers who use remote access and smartphones in the course of their employment. For example, a recent college graduate currently making $30,000 per year as a junior analyst and working 60 hours a week may not be qualified to receive overtime pay simply because her employer classifies her as a "professional" who is currently exempt from overtime regulations. If the overtime ceiling for salaried employees is raised to $50,440, that employee would be automatically eligible for overtime pay, regardless of the nature of her job.

In the United States, FLSA cases have spiked in the past 10 years, with a total of 8,126 cases filed during the 12-month period preceding March 31, 2014. This trend is expected to continue, especially when the Department of Labor's proposed rule to expand FLSA overtime protections is finalized. While remote access and smartphones may increase productivity in the workplace, there is often an implicit expectation that employees will be available during their off hours to respond to emails.

As a result, company-issued smartphones and similar technology often cause an employee's work to spill over into off hours. This may result in more suits similar to the one filed by salespeople at T-Mobile USA Inc. stores in 2009. The class-action lawsuit asserted claims for overtime wages, alleging that sales workers were required to review and respond to numerous "e-mails and text messages at all hours of the day and night." According to the complaint, the sales workers alleged that T-Mobile failed to pay them for the 10 to 15 extra hours a week they spent performing these off-the-clock duties. T-Mobile settled the suit in 2010 for an undisclosed amount.

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In another FLSA suit, a district court judge granted class certification in 2013 for certain individuals employed by the City of Chicago Bureau of Organized Crime (BOC) related to their FLSA claims against the City of Chicago. The named plaintiff alleges that the police department issued Blackberrys to members of the BOC. He alleges that there was an unwritten policy that BOC employees were expected to use these

Blackberrys and "be on-call twenty-four (24) hours, seven (7) days a week so that they could access work related e-mails, voicemails, and text message work orders regardless of their location." The plaintiff further alleges that time spent receiving and responding to these communications was not compensated – including overtime compensation – under the FLSA. Indeed, the employees within the BOC "felt obligated to respond to these e-mail communications and telephone calls while off duty … [and that] a culture had developed where police officers feel compelled to work for free in order to possibly gain a promotion and/or maintain their coveted assignment in a specialized unit." The City of Chicago denies that the plaintiffs are entitled to additional overtime compensation under the FLSA and contends that the plaintiffs cannot show that they performed compensable work for which the City had notice and/or that they were performing said work without being compensated. The City further denies the existence of unwritten policies by which plaintiffs were required to perform compensable work on their Blackberrys while off duty without compensation.

According to the proposed pretrial order in this case, the only issue to be determined at trial is whether the Chicago Police Department "maintained an unwritten policy that [p]laintiffs would not be paid for compensable overtime work performed outside of normal work hours on their Blackberrys [sic]." Legal precedent is lacking in this area, as these cases often settle out of court due to the expense of protracted litigation. Notably, the *Jeffrey Allen v. City of Chicago* suit proceeded to a bench trial, with the presentation of evidence and argument concluding on August 24, 2015. The forthcoming decision will be particularly instructive with regard to how employers should handle expectations of smartphone use during off-work hours.

TAKEAWAYS

The FLSA states that qualified employees must be compensated for overtime when an employer "suffered or permitted" the employee to do such work. Provided that an employer knows or should have known that work is being done and permits the employees to do so, such work must be counted toward overtime. If an employer does not wish for an employee to perform work after hours, it must specifically prohibit the employee from doing so if it does not wish to include that time in the required FLSA pay computations.

In the digital age of phone records and time-stamped emails, an employer has little difficulty knowing whether an employee is working during off hours. Thus, even if an employer does not require employees to respond to emails or phone calls off hours, the company can still be liable so long as a manager is aware that an employee is doing such work off hours.

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Companies must be mindful of nonexempt employees who use smartphones to send and receive work-related emails to avoid suits similar to those described above. To protect their interests, companies are advised to specifically prohibit nonexempt employees from after-hours work and take measures to enforce those rules, or cease issuing their employees smartphones and enabling remote computer access. Companies should also review their time-keeping policies and after-hours communications policies imposed on nonexempt employees to ensure compliance. However, if nonexempt employees truly need to be working after hours responding to emails, then a mechanism needs to be implemented to ensure accurate reporting of time spent and proper compensation for the hours worked.

The employment law specialists at Wilson Elser are available to assist businesses in understanding and complying with the rapidly changing workplace laws.

Members of Wilson Elser's Employment & Labor practice, located throughout the country, provide one convenient point of contact for our clients. Please contact any of the following partners to access the experience and capabilities of this formidable team.

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