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Wage & Hour

Fresh Off Release of Overtime Rule, DOL to Examine Use of Electronic Devices

The Labor Department faces added pressure to clarify how the use of mobile technology affects when the workday starts and ends, as millions of employees will be newly eligible for overtime under a recently finalized regulation.

Throughout this administration, DOL officials have wondered how to reconcile the Fair Labor Standards Act's long-standing rules on hours worked away from the workplace with the 24-hour access to the office afforded by modern technology. That's why the DOL's Wage and Hour Division expects to solicit information from stakeholders this summer on the impact of devices such as smartphones and laptops on overtime-eligible workers' hours.

Although the department's request for information on mobile work will be separate from the overtime rule (RIN:1235-AA11) released May 18 (95 DLR AA-1, 5/17/16), the projects are inherently intertwined.

''The additional people who are now eligible for overtime are people who are accustomed to being exempt and working outside of the office, outside of normal working hours,'' Joseph Tilson, chair-elect of the Wage and Hour Defense Institute, told Bloomberg BNA.

''They're primarily people who would fall into the category of middle management that likely would have mobile devices that they would use to work all hours of the day,'' said Tilson, a management-side attorney in Chicago.

Guidance or New Rule? Critics argue the rule's significantly raised salary threshold for overtime exemption will force employers to limit employee flexibility. For instance, rather than risk excessive overtime liability, employers may respond by blocking workers' ability to check e-mail on a smartphone or log in on a laptop remotely.

However, the Wage and Hour Division is developing a plan that might eventually delineate the legal options for companies in areas the courts have not interpreted consistently. This may ease employers' ability to allow overtime-protected workers to log in remotely and accurately track their time.

A DOL spokesman told Bloomberg BNA it's too soon to determine whether the request for information will lead to a rule or guidance, or if that will occur this year or in the subsequent administration.

Seth Harris, the former deputy labor secretary under President Barack Obama, told Bloomberg BNA that he doesn't expect a new regulation. Rather, he said it's ''much more likely that they will provide some kind of subregulatory guidance and perhaps some more extensive compliance assistance for workers and employers.''

''It may be that what we need'' from the WHD ''is some very smart thinking based on real-world examples that helps employers and workers to understand what counts as compensated work time and what doesn't,'' said Harris, who now practices law at Dentons in Washington and teaches at Cornell University.

Employers discussed this issue at listening sessions the DOL held during the overtime regulation's drafting phase. The 2015 proposal stated that it would be ''beyond the scope'' of this rule to address compensable work on electronic devices and announced an RFI would be published ''in the near future.''

The WHD estimated in the spring regulatory agenda that the RFI will come out in July (97 DLR B-2, 5/19/16). In addition to soliciting responses from employers, worker advocates and unions, Harris said the department will be seeking input from technology companies.

De Minimis Versus Compensable Time. The DOL's rule to double the salary level to $47,476 below which workers must be paid time-and-a-half for hours logged beyond 40 in a week takes effect Dec. 1.

Businesses with newly overtime-eligible workers who use electronics to work off-site must now determine how to track that unsupervised time and which scenarios require compensation.

Wage-and-hour management attorneys say employer monitoring of hours worked on mobile devices is a common practice that predates the overtime rule. Still, they're hopeful that through this RFI, the DOL will provide clarity on where the line is crossed from de minimis use of a smartphone or laptop to compensable work.

''There's quite a bit of confusion and conflict in the case law on the standard for determining what time is de minimis,'' said Tilson, who is chair of the labor and employment department at Cozen O'Connor PC. ''I believe it would be helpful for the DOL to come up with a clearer statement on the circumstances under which checking e-mails would amount to a de minimis activity.''

The subject of de minimis, or insignificant, activity under the FLSA arises in an array of wage-and-hour litigation contexts, such as time spent going through security screenings or donning and doffing protective gear. The courts rely on a long-established standard for when employees must be paid for off-site work: It must be work that's performed primarily and necessarily for the benefit of the employer, not the employee.

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The interaction with portable technology adds a new layer of complexity to an already ambiguous test, as a worker can easily and routinely respond to an e-mail from the boss at any time of day or night.

Checking E-Mail Before Work. Another area management attorneys would like to see the WHD address is how technology affects the start and end of the workday.

During the RFI, ''employers should request some clarity from the DOL or some confirmation that merely checking e-mails or performing very short in duration tasks at home doesn't then make a commute that follows compensable,'' Allan Bloom, a partner at Proskauer Rose LLP in New York, told Bloomberg BNA.

''The courts have said'' that the travel time in that context is not paid work, but ''I personally would like to see the DOL confirm that as a matter of national policy,'' said Bloom, co-head of Proskauer's wage-and-hour practice.

Attorneys Tracking Chicago Case. Absent DOL guidance, attorneys are closely tracking a class action brought by Chicago police officers, who sued the city for unpaid overtime stemming from a policy requiring them to be available to check work e-mails on their smartphones (240 DLR A-7, 12/15/15).

A federal judge dismissed the officers' claim, finding that the ''mere act of plaintiffs' 'monitoring' their BlackBerrys does not constitute an activity pursued necessarily and primarily for the benefit of the City under the FLSA, so long as the plaintiffs could still spend their off-duty time 'primarily for [their] own benefit without persistent interruptions.' '' The case is now under appeal.

The problem is, there's a dearth of case law specific to de minimis activity on electronic devices. It's been difficult for plaintiffs' attorneys to obtain class certification because employee experiences using mobile technology vary, Catherine Ruckelshaus, general counsel at the National Employment Law Project, told Bloomberg BNA. The exception is if an employer has a uniform policy of not tracking hours on portable devices and not telling workers that they shouldn't work outside of normal hours, she said.

Plaintiffs' Bar Says Issue Overblown. Ruckelshaus and her allies in the plaintiffs' bar think employer concerns about the burdens of tracking off-the-clock technology use are overblown.

''I know that there are issues about where the line is drawn for de minimis time,'' but ''I think it's perfectly clear that employers need to pay for this time if their employees are going to be doing work outside of working hours,'' provided the employer knows or should've known about it, William Jhaveri-Weeks, a partner at Goldstein, Borgen, Dardarian & Ho in Oakland, Calif., told Bloomberg BNA. ''I think a clear statement from the DOL confirming that would be helpful for everyone.''

Plaintiffs' attorneys would welcome WHD clarification on the topic, but their motivation differs from their management counterparts. ''A reason why we need DOL guidance is because a lot of employees don't complain about excessive overtime hours on their mobile devices,'' Ruckelshaus said. ''The employers are supposed to keep records, but they aren't being clear at all with their employees about the use of mobile devices and about overtime rules.''

Broader Than the Overtime Rule. As businesses wait for the department to act on electronic devices, they're faced with the distinct possibility that the WHD doesn't have enough time before the Obama administration is out of office to collect information, study it and generate a guidance or rule notice. More likely, observers said, the agency is establishing a record for the next administration.

But in the coming months, employers will still be developing their compliance plans for the overtime rule, which will likely include a policy on portable technology. Rather than forbidding off-site work altogether, businesses may want to think creatively about how they can continue to give newly nonexempt workers electronically remote access, Christopher Trebilcock, a principal at management firm Miller Canfield in Detroit, told Bloomberg BNA.

Even though the overtime rule has accentuated the need for DOL clarity on this subject, Harris, the former deputy labor secretary, said the RFI could have ramifications far broader than the regulation.

''The overtime rule is going to newly cover about 4.2 million employees with overtime protection,'' Harris said. ''There are tens of millions of workers who are using cellphones, tablets, laptops and home computers to work, and those workers are just as affected by the question about what constitutes an hour worked and how employers should record that time.''

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