Overtime Concerns for Employees with Mobile Devices

A NEW WORKING DYNAMIC

Increasing use of employer-provided mobile devices is reshaping working practices worldwide. By staying connected to their offices, employees have been able to become more productive and more valuable to their employers. Indeed, it’s not unusual these days to find individuals checking their email during their morning commute, preparing a report from the local coffee shop or participating in a video conference from home, hours after the office has closed.

However, this connectivity revolution is also a source of concern for employers and employees alike. Employees worry about the amount of time they spend working outside the office. They feel increasing pressure, particularly during difficult economic times, to take their work with them wherever they go. Employers worry about overtime liabilities that may arise when employees work remotely during unconventional hours.

Ironically, this changing dynamic is still regulated by legislation that has not changed much in the last 50 years. Still, a careful consideration of overtime provisions and exceptions under applicable law can help employers avoid the liability that may arise when employees work beyond the traditional nine-to-five schedule.

FLSA OVERTIME REGULATIONS AND PENALTIES

Most employers in the United States are subject to the Fair Labor Standards Act (FLSA). Under the FLSA, there is no limit on the number of hours employees may work in any workweek, but employees must receive one and one-half times their regular wage rate for all hours worked over 40 hours in a workweek.

Sanctions for violating FLSA overtime regulations can be severe and may include fines of up to $10,000, imprisonment for up to six months, civil liability and any other penalty a federal or state court considers appropriate.

The main difficulties employers face when determining if an employee working remotely is entitled to overtime compensation are:

- Whether the employee is exempt from overtime regulations; and
- Whether the employee’s remote work is compensable time.

FLSA EXEMPTIONS

If an employee falls within an FLSA overtime exemption, then the employer does not need to worry about how many hours the employee spends working remotely. The FLSA provides a number of exceptions to overtime compensation, such as the exemptions for outside sales employees, computer and information technology personnel and certain commissioned workers of retail or service establishments. However, the most common exemptions for employees using employer-provided mobile devices are known as the white collar exemptions. For a fuller description of FLSA regulations and exemptions, please contact your Sentinel Benefits & Financial Group representative.

The white collar exemptions apply to individuals employed in a bona fide executive, administrative or professional capacity. As a matter of procedure, the FLSA presumes that an employee is not exempt from overtime pay and it is up to an employer to prove otherwise.
To prove that an employee qualifies for a white collar exemption, an employer must show that the employee satisfies the salary and duties tests set out by the FLSA. If an employee fails to pass one of these tests, the employee is not exempt from FLSA overtime regulations.

**The Salary Test**

To pass the salary test, the employee generally must be paid on a salary basis and receive at least $455 per week. This translates as an annual salary of $23,660. In most cases, the salary test is a hurdle easy to clear.

**The Duties Test**

The duties test is slightly different for each type of employee. To satisfy the duties test, an **executive** employee must:

- Be primarily responsible for the management of the enterprise, division or subdivision in which he or she is employed;
- Regularly and customarily direct the work of two or more employees; and
- Have the authority to hire or fire other employees (or make suggestions and recommendations that receive particular weight in the firing, hiring, advancement, promotion or any other change of employment status for other employees).

An employee satisfies the **administrative** employee duties test if his or her duties primarily require:

- Performing office or non-manual work that is directly related to the management or general business operations of the employer; and
- The exercise of discretion and independent judgment with respect to matters of significance.

To satisfy the duty requirements for a **professional** exemption an employee’s primary duties must require:

- Advanced knowledge in a field of science or learning typically obtained by a prolonged course of specialized study; or
- Invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

**COMPENSABLE WORK**

If an employee does not qualify for an FLSA exemption, the employer must determine whether the employee’s remote activities are considered work and are therefore compensable.

The U. S. Supreme Court has defined work or employment as physical or mental exertion that is controlled or required by an employer for the employer’s benefit. The Court has recognized that this description includes the idea that an employer may hire an employee and require him or her to do nothing or to wait for something to happen.

An employee working remotely is performing compensable work if he or she is performing a **principal activity** or if he or she is **on-duty**. If the employee is performing compensable work and is not covered by an FLSA exemption, he or she is entitled to overtime compensation. However if the amount of overtime compensable work is negligible, the **de minimis** doctrine will allow an employer to overlook FLSA requirements.

**Principal Activity**

The Portal-to-Portal Act of 1947, a supplement to the FLSA, defines work as the employee’s performance of his or her duties—the principal activity for which he or she was hired. This definition includes any activity in which an employee must participate to perform his or her principal activity.
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For example, employees working with hazardous materials are considered to be working when they put on or take off protective clothing and equipment. However, the Act also limits the scope of activities related to work and specifically excludes any time an employee spends in “preliminary or postliminary activities” such as traveling to or from work.

**Employees On-duty**

The use of mobile devices has blurred the line between the times when an employee is expected to work and when an employee independently and willingly chooses to work during his or her time. Allowing employees to work remotely raises considerations of on-call employment where employees may not be present at the workplace but are still expected to participate, report or respond to the employer requests on a moment’s notice.

To decide whether an employee is on-duty while working on a mobile device, an employer must determine whether the employee was relieved of all duties at the time of his or her remote work. The degree of interference and control an employer has over an employee’s actions while the employee is working remotely plays a key role in determining whether an employee is on-call or has free use of his or her time.

**De Minimis Doctrine**

The United States Supreme Court has adopted the *de minimis* doctrine to deal with negligible amounts of work employees perform when they are off-duty. The Court has reasoned that penalizing negligible violations is unnecessary and that if an employee’s remote work is *de minimis*, the employer should not have to worry about compensating the employee.

To determine whether overtime remote work is *de minimis*, employers should consider whether:

- It would be practical, from an administrative perspective, to record the additional time;
- The aggregate amount of additional remote work is significant; and
- The employee regularly engages in overtime work.

**RECOMMENDATIONS FOR EMPLOYERS**

Employers can take actions to help avoid liability for unpaid overtime compensation to employees who work remotely with the assistance of mobile devices. Employers can implement mobile device policies, ensure proper employee classification, keep track of their employees’ remote work time and train their personnel on overtime regulation issues.

**Mobile Device Policies**

Employers should review their policies and objectives to determine which employees within their organizations need or should have access to employer-provided mobile devices or remote work options. Choosing to limit remote connectivity to the workplace to employees exempt from overtime regulations reduces the amount of liability to which employers may be exposed.

Employers should also adopt policies to require non-exempt employees to obtain authorization from their supervisors to work remotely before the employer’s IT department provides them with a mobile device or remote access to the employer’s network.

In addition, employers should adopt policies that instruct employees on their work-hour requirements, whether they are required or expected to check company email off-the-clock, how fast they are required to respond if an answer is necessary and whether individuals who make an personal decision to contravene this policy will be paid for doing so.
Employee Classification

Employers should also review FLSA exemptions carefully and ensure they are classifying employees and their exemptions appropriately. When classifying an employee, employers should consider their employee’s salary and job description.

As part of this classification, employers should periodically update their employees’ job descriptions and harmonize the descriptions with the employees’ actual responsibilities at the workplace. Updating an employee’s job description may also lead an employer to adjust or update the employee’s exemption status.

Keep Accurate Records

The United States Department of Labor (DOL) encourages individuals to keep personal records of their work hours and will compare an employee’s personal records to the employer’s records during a wage and hour investigation. The DOL has made it even easier for individuals to keep track of work hours by making available to the public a time-tracking smartphone application.

Because of increased DOL attention to the issue, employers should engage in an independent and proactive determination of whether employees working remotely are working overtime. Technological advances make it possible for employers to keep track of employee usage of employer-provided mobile devices. Employers should consider the costs and effort necessary to monitor remote work hours when developing internal policies to regulate employee connectivity.

Training

After adopting remote work and connectivity policies and procedures, employers should educate their employees on these policies and on their specific work responsibilities. Employers should also take time during training sessions to set clear expectations for employee overtime work.

In addition, employers should spend additional time training their managers and supervisors on overtime issues created by remote connectivity. Managers and supervisors are primarily responsible for monitoring and ensuring employee compliance to overtime policies and should be able to recognize when any particular situation may expose the employer to FLSA liability.