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**33 HRR 901**

### **Wage & Hour**

## **DOL to Consider Rule on Device Use Outside Work Hours**



*By Gayle Cinquegrani*

Aug. 19 — As smartphones and other personal electronic devices become more common, many employers and employment lawyers are looking to the Labor Department for help in determining when employees must be paid for connecting with their jobs during hours they aren't scheduled to work.

The DOL has signaled its interest by announcing it will formally seek public input on the topic by the end of the month.

"When technology changes, it's important to keep in mind that rules about paying employees properly still come into play," Peter J. Gillespie of Fisher & Phillips LLP in Chicago told Bloomberg BNA Aug. 19.

"The Department of Labor is going to have to help us figure out where you cross the line from de minimis use of a smartphone or laptop into actual compensable work," Judy Conti, the federal advocacy coordinator for the National Employment Law Project, told Bloomberg BNA Aug. 18.

The DOL plans to issue its request for public information about employees' use of portable technology outside their workplace and normal work hours during August, a department spokeswoman told Bloomberg BNA Aug. 18. The DOL's spring 2015 regulatory agenda introduced the item (RIN 1235-AA12) and described it as being in a prerule stage (33 HRR 568, 6/1/15).

### **Payment Required Unless Work De Minimis**

The issue of workers using electronic devices to work after-hours "comes up frequently, particularly for non-exempt employees" who are eligible for overtime, according to Jonathan Keselenko of Foley Hoag LLP in Boston. The law is clear that work must be compensated unless the amount of work time is de minimis, Keselenko, the chair of the Wage and Hour Defense Institute, told Bloomberg BNA Aug. 18.

"De minimis" is not defined, however. "That may be what the Department of Labor is going to opine about further," Keselenko said. Employers should be "more concerned" about state regulations because most state wage and hour laws don't contain a de minimis exception, Keselenko said.

He counsels his clients to instruct their hourly employees not to check their e-mail during off-work hours, or at least to track their time if they do. Even if an employer refuses to issue a smartphone or electronic device to an employee, many employees own personal electronic devices that can "sync up" with the employer's computer and telephone systems, Keselenko said. "It's really hard for employers to track that," he added.

"Companies should have policies that govern working remotely and after hours," Keselenko said. "Those policies should require employees to report all the time that they work—regardless of whether it's from the office, or from home," or from a portable device, he said. To avoid incurring overtime liability or inadvertently violating wage and hour laws, he said, employers can forbid employees to work from home and discipline them if they do, "but that doesn't relieve them from the obligation to pay them."

"Many employees want to have the ability to communicate with work on [their] off hours," perhaps to check their schedules or to keep attuned to breaking developments, but sometimes "it puts the employer at risk," Keselenko said. He didn't speculate as to what the DOL may do with this issue, but said it would be "helpful" to know "whether there's a small enough amount of work for which they wouldn't pursue claims"—such as "chunks of three minutes here or four minutes there" during which an employee checks for messages.

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The issue of after-hours work is most likely to cause a problem "where the employee comes in after the fact and says they should have been paid for hours that weren't recorded on a time sheet," Gillespie said. "If it's erratic non-regular occurrences of short duration," the work may be considered de minimis and therefore noncompensable, he said. "The claims that are

potentially problematic" are those based on regular, lengthy e-mails occurring outside of work hours, he said.

### **Extra Work Could Trigger Overtime Premium**

"This additional variable" creates the possibility that an employee scheduled to work 37.5 hours per week would be pushed over 40 hours and into the time and one-half overtime pay category, Gillespie said. If this occurs with several employees, in the aggregate it could cost an employer a lot of money, he said.

Companies should train their managers and supervisors that if they're reaching out to their employees during off-hours, they may have to pay them. "Managers and supervisors of hourly employees should realize that off-duty e-mails should be absolutely minimal, and employees should record the time," Gillespie said. An employer's failure to pay an employee shouldn't be considered a willful violation if it was inadvertent, he said.

Liz Morris, the deputy director of the Center for WorkLife Law at the University of California, Hastings College of Law, said she hopes the DOL's attention to this subject will give a boost to telecommuting. "I would love for the Department of Labor to seek information from stakeholders because I would love to see a way for employees who are non-exempt to work from home while still receiving the wages they have earned," she told Bloomberg BNA Aug. 18. "Without any guidance on how to compensate employees' use of electronic devices, employers are going to be fearful," she said, but "with some guidance, more employers will recognize the benefits of allowing employees to telecommute."

### **Predicting Future DOL Action**

Conti also welcomes the DOL activity here. "There's absolutely a need to request the information," she said, but conceded, "I'm not sure what the step should be." There's a difference between answering an occasional work-related e-mail and being kept on an "electronic leash" during supposedly off-work hours, Conti said. Establishing a standard will be difficult "because you can't put out a bright-line test" without prohibiting all after-hours work using electronic devices, and "that's not realistic," she said.

"There will be a rule at some point," Michael C. Schmidt, the vice chair of the labor and employment department at Cozen and O'Connor in New York, told Bloomberg BNA Aug. 14. He predicted any rulemaking likely would entail "three hot spots"—the "question of de minimis time," the "record-keeping obligation," and "the e-mail curfews" instituted by some employers forbidding workers to check and respond to electronic messages during specified time frames.

A rule would be "unlikely" to appear on the agenda if a Republican wins the White House before the rulemaking is complete, Schmidt said. Even if there isn't time for a complete rulemaking on portable devices before the election, "that doesn't mean that the issue is dead," he added. "I don't necessarily believe it will happen before Election Day, but I do believe we will see the Labor Department issue something on portable devices, whether it's guidance or a formal rule."

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