Emerging Technologies and the FLSA

by Steven M. Gutierrez and Joseph Neguse

For more than seventy years, the Fair Labor Standards Act (FLSA) has been the foundation for regulatory supervision and enforcement in the context of wage and hour law. Although the FLSA has survived the political fluctuations of the federal government, it faces an uncertain future with the increased use of BlackBerrys,® iPhones, and other new technologies. This article provides a brief overview of FLSA overtime provisions, the effect of potential violations, recent cases concerning emerging technologies, and a summary of steps employers may consider in light of the demands of doing business in the 21st century.

The Fair Labor Standards Act (FLSA)[1] is enforced by the Wage and Hour Division of the U.S. Department of Labor (DOL), and impacts an estimated 130 million workers.[2] Among the FLSA's most well-known provisions is the requirement that employers pay employees one and one-half times their regular wage for any hours worked over the standard "workweek," defined as forty hours per week.[3] This general requirement for overtime compensation is riddled with exceptions, many of which have been the subject of steady litigation, year after year.

Recently, some employees have sought to extend the protections afforded by the FLSA to the work they are able to perform as a result of new technology. The clearest example is the increased usage of smartphones and other personal data assistants (PDAs) over the last decade. As more employees use mobile telephones, BlackBerrys,® and iPhones, employers and regulatory agencies are faced with several critical questions. As commentator Carmel Sileo notes:

> Modern technology has made it easy and convenient for workers to telecommute, fielding work-related phone calls and e-mails when away from their offices. But that convenience has a catch: When is time "off" really off?[4]

He concludes, "[N]ew technology that enables people to work from off-site locations has muddled the distinctions between work and home."[5] Moreover, as employees' personal lives and professional duties become increasingly interrelated, the growth of online social networking websites like Facebook and Twitter has further distorted those same distinctions. The new modes of communication have one thing in common: they challenge the validity of the 9-to-5 workday, a premise that remains inextricably connected to the FLSA framework.

Requirements for Overtime Pay Under the FLSA

The FLSA exempts a large number of employees from receiving overtime pay, as long as they satisfy specific statutory tests and thresholds. For example, executive, administrative, professional, computer, and outside sales employees[6] are exempt.[7] These classifications often are called the "white-collar exemptions," because they do not apply to blue-collar workers.[8] In 2004, the DOL revised the white-collar exemptions.[9] Though some of the antiquated standards articulated by the FLSA were discarded, the central thrust of the FLSA remains intact: employers must compensate an employee for overtime work unless the employee is properly classified as exempt under the FLSA. As recent as 2007, an estimated 86 percent of the American workforce (approximately 115 million people) were "covered by the federal overtime rules,"[10] making the FLSA overtime provisions all the more important.

The various tests associated with classifying employees as exempt and nonexempt can be difficult to apply. The decision to classify an employee as exempt can expose employers to significant legal liability. As a general matter, to be classified as exempt, an employee must meet certain criteria based on his or her salary and duties.

For example, to qualify as an exempt administrative employee, an employee must receive a salary of at least $455 per week and have a primary duty of office work that is directly related to the general business operations or management of the employer.[11] Ad-

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ditionally, the employee's primary duty must include "the exercise of discretion and independent judgment with respect to matters of significance."[12]

To qualify as an exempt executive employee, the employee must receive a salary of at least $455 per week, "customarily and regularly direct the work of at least two or more other employees," have some authority concerning employee personnel decisions, and have a primary duty of "management of the enterprise in which the employee is employed or of a customarily recognized department."[13] The tests for the various exempt categories are different in many respects. As such, employers are well advised to pay particular attention to both the statute and corresponding regulations.

One important requirement, however, applies universally under the FLSA: all non-exempt employees must be paid for overtime at time and one-half the regular rate of pay "for all hours worked over 40 hours in a workweek."[14] Importantly, under the FLSA, the term "employ" is defined as "to suffer or permit to work."[15] Hence, "time spent doing work not requested by the employer, but permitted, is generally considered work time."[16] This construction of the FLSA makes the exempt classifications critically important.

There are some exceptions. For example, the Employee Commuter Flexibility Act, "in addition to exempting commute time from compensation, also provides that an employer need not compensate an employee for 'activities which are preliminary or postliminary to said principal activity or activities.'"[17] In addition, "an employer's obligation to pay for the employees' efforts [is] moderated by a *de minimis* rule."[18] Nonetheless, employees who are classified as nonexempt generally must be paid one and one-half times their hourly wages for overtime work.

The Potential Impact of FLSA Violations

Since its passage, many employers have struggled to comply with the complex rules and procedures imposed by the FLSA. Over the last decade, the DOL's Wage and Hour Division has collected more than $1.4 billion in back wages.[19] In 2008 alone, the DOL recovered back wages for more than 228,000 employees, totaling over $185 million.[20] This was coupled with civil monetary penalties totaling more than $9.9 million.[21] The enforcement statistics concerning overtime pay are no less staggering. For instance, there were 10,105 violation cases reported by the DOL in 2008, with 182,964 employees receiving $123,686,617 in back wages.[22]

Resolution of Disputes

As a practical matter, businesses that violate the FLSA may have to travel a long and difficult road to resolve the dispute. Resolution of an FLSA overtime claim can include civil penalties and fines, criminal prosecution,[23] countless hearings, attorney fees, back pay, liquidated damages,[24] negative publicity, and expensive collective action settlements.

For example, in 2009, two multi-million dollar settlements were reached in overtime FLSA disputes. In August 2009, a large corporation settled for an estimated $23 million to resolve a "class-action complaint in federal court that alleged the company illegally withheld overtime pay to drivers on its delivery routes."[25] In that case, the delivery drivers claimed they were misclassified as exempt employees and, thus, denied overtime compensation.[26] Even after insurance proceeds and taxes, which reduced the impact of the settlement on the company's bottom line, "[a]t $12 million, the after-tax charge from the settlement would have reduced [its] fiscal 2009 (ended in May) net profits of $226 million by about 5 percent."[27]

Similarly, after seven years of litigation, another nationwide corporation settled an overtime compensation dispute for $29.5 million in September 2009.[28] The crux of the lawsuit was the allegation that thousands of hourly "workers were required to work before and after their normal shifts but were not paid for the extra work."[29]

Collective Action Claims

The growing number of "collective action" claims under the FLSA also should give employers pause. As noted by attorney David Borgen, under 29 U.S.C. § 216(b), the FLSA "permits the aggregation of hundreds or thousands of claims requiring only that the employees be 'similarly situated.'"[30] These claims differ from a typical class action under Federal Rule of Civil Procedure 23 in many ways. In particular, the standard for aggregating an FLSA claim is "less stringent."[31] Procedurally, courts typically employ a two-tiered review when adjudicating potential FLSA collective actions.[32] The initial review, however, "known as the notice-stage determination . . . typically results in 'conditional certification' of a representative class."[33]

For example, in *Roebuck v. Hudson Valley Farms, Inc.*, the U.S. District Court for the Northern District of New York held that three employee affidavits were "sufficient to constitute a preliminary showing" of a potential FLSA violation.[34] The case involved a migrant farm worker who alleged that his employer violated the FLSA by not paying him and similarly situated employees for their overtime work.[35] Though the worker offered only three affidavits to support these allegations, the court found the affidavits sufficiently demonstrated that the employer may not have paid them "time and a half for overtime when the employees performed work which fell outside the agricultural exemption from the overtime pay requirement of the FLSA."[36] Significantly, the court reasoned that, under 29 U.S.C. § 216(b), "plaintiffs need only make a *modest* factual showing"[37] to proceed with notice to the potential class of litigants.

In sum, the standard for collective actions under the FLSA can, in some cases, be an undemanding one. The prospect of a collective action claim under the FLSA makes clear that employers must carefully evaluate their business practices to ensure compliance with the FLSA, as discussed below.

Emerging Risks Posed by New Technology

Compensable time under the FLSA has been further complicated by the growing trend of employees engaging in work outside their standard workday. Specifically, the use of smartphones, e-mail, and other communication tools has challenged the traditional notion of overtime. Employers are faced with an increasing list of conceptually difficult questions regarding legal compliance with the FLSA. For example: Is an employee who checks her BlackBerry at home entitled to overtime compensation? Should an employee be paid for reading or sending work-related e-mail at home when he does so of his own volition? Should he be compensated for the written updates he provides concerning his company's services on his personal Twitter page? Does an employee's use of a cell phone after-hours constitute hours worked under the FLSA?

Over the last year, some courts have begun the process of answering these questions. As Sileo observed, "two recent lawsuits highlight the problems of this blurred boundary."[38]

The Agui *Case*

In *Agui v. T-Mobile Inc.*, several former and current employees sued T-Mobile, "claiming they were required to use company-issued smart phones to respond to work messages after hours without pay."[39] The facts of the dispute were relatively straightforward. The three plaintiffs were employed as nonexempt sales representatives at T-Mobile for several years.[40] During that time, each plaintiff was given a BlackBerry or other device. They alleged they were

> required to review and respond to T-Mobile related emails and text messages at all hours of the day, whether or not they were punched into T-Mobile's computer based timecard system.[41]

As nonexempt employees, the plaintiffs argued that they were entitled to overtime wages for the ten to fifteen hours they spent every week "reviewing and responding to emails, texts, phone calls" and more.[42] The suit alleged that the plaintiffs complained and were told by a manager that "this was one of T-Mobile's standard business practices."[43]

Although the complaint was filed by three individual employees, they pled their claim on behalf of "all other similarly situated current and former employees" of T-Mobile.[44] Given that T-Mobile employs at least 36,000 employees nationwide,[45] the certification of a collective action would have been significant. In May 2010, however, the parties reached a confidential settlement agreement,[46] leaving the central question raised by the plaintiffs' allegations unanswered.

The Rulli *Case*

In *Rulli v. CB Richard Ellis, Inc.*, an employee filed a collective action claim under 29 U.S.C. § 216(b) against CB Richard Ellis for unpaid overtime compensation.[47] The plaintiff alleges that he and other employees were "given personal data assistants, such as Blackberries, smart phones, cell phones, pagers or other communication devices."[48] Further, he claims that all employees were required to use these devices beyond normal working hours and received no compensation for doing so.[49] The plaintiff also argues that CB Richard Ellis required him and others to respond to incoming messages on these devices within fifteen minutes of receiving them.[50] The plaintiff's attorney, Nola Hitchcock, stated:

> These workers were getting text messages from their supervisors while they were at home having dinner or out watching a movie. And they had to respond, even though they were off the clock and not being paid for it. It was really intrusive.[51]

The damages sought by the plaintiff are similar to the damages requested by the employees in *Agui*, namely, unpaid back wages and liquidated damages under 29 U.S.C. § 216(b).[52] Perhaps more damaging, "potential clients could number in the thousands."[53]

Though the claims in *Agui* have been settled, *Rulli* could provide important guidance, because some believe it "is the first case that focuses on this technology."[54] Although the case is far from being resolved, recent litigation may shed further light as to compliance under the FLSA in this context.[55] Recently, the Ninth Circuit considered similar issues in *Rutti v. Lojack Corp., Inc.*"[56] There, the court held that the time technicians spent sending work-related transmissions from home may be compensable and not subject to the *de*

minimis rule.[57] The court observed that "there is no precise amount of time that may be denied compensation as *de minimis*" and "no rigid rule can be applied with mathematical certainty."[58]

Ultimately, the key issue posed by *Rulli* is whether nonexempt employees are entitled to overtime compensation when performing work on electronic devices outside the office. As explained above, hours worked outside the regular workweek are considered overtime when the employee is made to "suffer" or "permitted" to work.[59] Therefore, overtime pay is required when the "employer knows or has reason to believe that he is continuing to work."[60] As Gregory F. Jacob, a former Solicitor of Labor explained, "[p]roviding non-exempt employees BlackBerry devices, PDAs, remote email access, or even cell phones suggests the employer expects remote off-shift work will at least occasionally need to be performed."[61] Thus, the plaintiff in *Rulli* could argue that his employer knew (or had reason to know) that he might engage in work-related activities beyond the office by providing him with such devices. Whether these activities are deemed *de minimis*, however, remains to be seen.

Staying Ahead of the Curve: Complying With the FLSA

As Baldas observed in *The National Law Journal*:

> [m]anagement-side attorneys fear a new wave of wage and hour litigation is just around the corner, in which employees will claim overtime for all the hours they've spent clicking away on their BlackBerries or other digital communication devices.[62]

Employers should be vigilant in ensuring full compliance with the FLSA's overtime provisions. At a minimum, employers should advise against overtime for nonexempt employees that has not been authorized in advance, and should adopt policies to that effect. In addition, employers may consider taking the steps discussed below.

Draft and Enforce Comprehensive Human Resources Policies

Exempt employees are not entitled to compensation for overtime work. If an employee is misclassified as exempt, however, an employer could owe thousands of dollars in unpaid overtime compensation. Employers must carefully draft their policies concerning exempt and nonexempt employees to ensure that their workforces are properly classified under federal statute.

Provide Smartphones Sparingly to Nonexempt Employees

By providing an employee with a smartphone or other communication device, it is arguable that an employer is implicitly acknowledging that the employee will perform work outside normal business hours.[63] Although an employer might not expressly authorize the employee to respond to e-mails late in the evening, the employee's possession of the device raises several legal issues. Employers should restrict company-owned smartphones to exempt employees whenever possible.[64] Further, those nonexempt employees who must be provided smartphones should be advised to use the instruments only with prior authorization.[65]

Conduct Regular Audits

Performing regular audits of exempt and nonexempt classifications and of hours worked by all employees is a prudent step employers can take to protect their businesses from potential liability under the FLSA. An audit can be performed in several steps, including information gathering, an on-site interview, and subsequent analysis of the information acquired. Also, an audit can produce better risk-management mechanisms and internal payroll and timekeeping controls for nonexempt employees, which can further reduce the risk of violating the FLSA's overtime provisions. An audit also can be useful in developing appropriate decision-making protocols for dealing with specific employment-related risks. Thus, the next time an employee alleges an FLSA violation, the employer will be prepared and the process used to resolve the dispute will be clearly articulated and defined. An audit of an employer's human resource policies and procedures can prove immensely helpful, because it will assist the employer in complying with the FLSA.

Conclusion

By implementing the recommendations described above, employers will be better positioned to avoid violating the overtime provisions of the FLSA. Also, by performing an audit of internal human resources policies, an employer can engage in useful risk assessment and revise any policies that require clarification. Such clarifications, specifically as they relate to mobile technology, will protect employers from FLSA overtime claims. Although there is no perfect solution, taking these steps may go a long way in preparing employers for potential FLSA claims involving BlackBerrys, iPhones, and the countless other devices that surely will emerge in the future.

Notes

1. 29 U.S.C. §§ 201 *et seq.*

2. *See* U.S. Department of Labor (DOL), "Employment Law Guide: Wages and Hours Worked, Minimum Wage and Overtime Pay" (Sept. 2009), available at www.dol.gov/compliance/guide/minwage.htm.

3. *Id.* ("the Act requires employers to pay covered employees not less than one and one-half times their regular rate of pay for all hours worked in excess of 40 in a workweek, unless the employees are otherwise exempt").

4. Sileo, "More Workers Look to Lawsuits for Paycheck Protection," 45 *JTLA Trial* 12 (Nov. 2009).

5. *Id.*

6. These terms are further defined by 29 U.S.C. § 201(13)(a)(1).

7. *See* DOL Wage and Hour Division, "Fact Sheet #17A: Exemption for Executive, Administrative, Professional, Computer & Outside Sales Employees Under the Fair Labor Standards Act (FLSA)," available at www.dol.gov/whd/regs/compliance/fairpay/fs17a_overview.pdf.

8. *See id.*

9. *See* Tilson *et al.*, "Hot Topics in Wage and Hour Law," Practicing Law Institute 38th Annual Institute on Employment Law (Oct. 1-2, 2009) ("On August 27, 2004, the . . . DOL implemented sweeping changes to the Regulations governing the 'white collar' overtime exemptions under the FLSA").

10. Orey, "Wage wars: Workers—from truckers to stockbrokers—are winning overtime lawsuits," *BusinessWeek* (Sept. 24, 2007), available at www.msnbc.msn.com/id/20908975.

11. 29 C.F.R. § 541.200(a)(1) and (2).

12. 29 C.F.R. § 541.200(a)(3).

13. 29 C.F.R. § 541.105(a)(1) through (4).

14. *Davis v. Mountaire Farms, Inc.*, 453 F.3d 554, 556-57 (3d Cir. 2006), *citing* 29 U.S.C. §§ 206(a)(1) and 207(a)(1).

15. 29 U.S.C. § 203(g).

16. *Anglin v. Maxim Healthcare Servs., Inc.*, 2009 WL 2473685 at *7 (M.D.Fla. 2009), *citing Reich v. Dep't of Conservation and Natural Resources, State of Alabama*, 28 F.3d 1076, 1082 (11th Cir. 1994).

17. *Rutti v. Lojack Corp.*, 596 F.3d 1046, 1054 (9th Cir. 2010).
18. *Id.* at 1056.
19. DOL, Wage and Hour Division, "Wage and Hour Collects Over $1.4 Billion In Back Wages For Over 2 Million Employees Since Fiscal Year 2001"(Dec. 2008).
20. *Id.*
21. *Id.*
22. *Id.*
23. DOL, *supra* note 2 ("willful violators may be prosecuted criminally and fined up to $10,000. A second conviction may result in imprisonment").
24. *Id.*
25. "Cintas reaches settlement in lawsuit," *Business Courier of Cincinnati* 1 (Aug. 20, 2009), available at www.bizjournals.com/cincinnati/stories/2009/08/17/daily43.html.
26. *Id.*
27. *Id.*
28. "Lowe's to pay $29.5 million to settle overtime lawsuit," *Central Valley Business Times* (Sept. 23, 2009), available at www.centralvalleybusinesstimes.com/stories/001/?ID=13150.
29. *Id.*
30. Borgen, "An Introduction to Litigating FLSA Collective Actions for the EEO Lawyer," American Bar Association Labor and Employment Section, Equal Employment Opportunity Committee Mid-Winter Meeting (March 29, 2001).
31. *Id.* at 3, *citing Grayson v. K-Mart Corp.*, 79 F.3d 1086, 1096 (11th Cir.1996).
32. Tilson, *supra* note 9 at 787 (explaining that "[n]otwithstanding the lack of uniformity, a majority of courts including the Fifth, Tenth and Eleventh Circuits, apply the two-tiered approach").
33. *Id.* at 783.
34. *Id.* at 790. *See also Roebuck v. Hudson Valley Farms, Inc.*, 239 F.Supp.2d 234, 239 (N.D.N.Y. 2002).
35. *See Roebuck, supra* note 34 at 235.
36. *Id.* at 239.
37. *Id.* at 238, *quoting Realite v. Ark Restaurants Corp.*, 7 F.Supp.2d 303, 306 (S.D.N.Y. 1998) (emphasis added).
38. Sileo, *supra* note 4.
39. Sanserino, "Theory & Practice: Suits Question After-Hours Demands of Email and Cellphones," *The Wall Street Journal* at 1 (Aug. 10, 2009).
40. Complaint, *Agui v. T-Mobile USA, Inc.*, No. 2009-cv-092955 at 8 (E.D.N.Y. July 10, 2009).
41. *Id.* at 9.
42. *See id.*
43. Sileo, *supra* note 4.
44. *Agui, supra* note 40 at 1.
45. "T-Mobile Company Information," available at www.t-mobile.com/Company/CompanyInfo.aspx?tp=Abt_Tab_CompanyOverview.
46. Stipulation of Dismissal with Prejudice, *Agui, supra* note 40.
47. Complaint, *Rulli v. CB Richard Ellis, Inc.*, No. 2009cv00289 (E.D.Wis. March 13, 2009).
48. *Id.* at 2.
49. *See id.*
50. *Id.* at 4.
51. Sileo, *supra* note 4.
52. *Rulli, supra* note 47 at 2.
53. Sileo, *supra* note 4.
54. *Id.*
55. *See* Jacob, "Avoiding Liability for Off-the-Clock Work in the Brave New World of the Blackberry," 36 *Employee Relations L.J.* 1, 42 (Summer 2010).
56. *Id.*
57. *See Rutti, supra* note 17 at 1058.
58. *Id.* (quotations omitted).
59. 29 C.F.R. § 785.11 ("Work not requested but suffered or permitted is work time.").
60. *Id.*
61. Jacob, *supra* note 55 at 51.
62. Baldas, "Overtime suits may ripen with BlackBerrys," *The National L.J.* (April 28, 2008), available at www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1208774508977&slreturn=1&hbxlogin=1.
63. *See* Jacob, *supra* note 55 at 51.
64. Baldas, *supra* note 62 (some attorneys suggest that their clients "give BlackBerrys only to exempt employees").
65. *See id.* ("Some employers may want to require that employees get permission first before using their BlackBerrys after work hours."). ■