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HOW TO PREPARE YOUR MANAGERS FOR THE NEW FEDERAL OVERTIME REGULATIONS

By Jessica Golden Cortes

In the public relations, fashion, media, marketing and advertising industries, a culture of long hours and high expectations for junior employees is the norm. Managers of these employees are in the habit of wanting employees at their fingertips – literally – via email and text, at all hours of the day, including during “off-the-clock” hours.

But this habit could have very expensive consequences to employers when the new federal overtime rules go into effect. As of December 1, 2016, many junior employees who currently are not eligible to receive overtime pay will automatically become eligible to receive it – regardless of their job duties – unless employers agree to pay them at least \$47,476 a year (equivalent to \$913 a week). This is more than double the current compensation floor for exempt white collar employees under the Fair Labor Standards Act (FLSA), the federal law that chiefly governs how U.S. employers must pay most employees. The current minimum salary for white collar exempt employees is \$455 a week, which annualizes to \$23,660.

If employers do not plan to raise employee salaries to meet the new minimum, a significant portion of the junior employee population will be re-classified as non-exempt under the FLSA, and thus become eligible for overtime pay. This will result in the need for a cultural shift in which managers better track, understand, and manage employee hours.

MAJOR HOURS-TRACKING SHIFT AHEAD

Currently, many companies may not be carefully tracking hours for employees who are exempt from (ineligible for) overtime, because they receive the same rate of pay regardless of how many hours they work in a given workweek. So to date, their managers have been free to ask and expect them to work long hours, at night and on weekends without a second thought as to cost.

But as of December 1, 2016, if these employees are earning less than \$47,476 per year (\$913/week), employers will have to pay them overtime if they work more than 40 hours in a week – or in California, more than eight hours in a day (or in some cases, double overtime pay, due to specific California laws governing overtime).

How will the new overtime requirements mesh with the continued need to meet 24/7 client demands, where there are high expectations of responsiveness and the need for immediate, quality results? How will they fit into a culture where managers are used to emailing employees at 9 p.m. about a task? How can industry employers properly pay junior employees, who do so much of the legwork to meet client needs, without a significantly detrimental impact on profit?

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THE KEY IS PREPARATION NOW

The key to managing overtime obligations going forward is to start talking — as soon as possible — to managers who oversee the employees who are most likely to be reclassified when the new regulations go into effect. These managers will have to become much more vigilant about how and when they are assigning work, and when they expect it to be completed. Now is the time to start training your management team to be your front line of compliance with the new regulations.

As your time-keeper advocates, these managers should be able to tell you:

- 1) How many hours per week their direct reports are working
- 2) Whether they can re-assign or re-staff work to help balance the workload between direct reports
- 3) Whether it could be more cost-efficient to hire and train an additional junior employee rather than pay overtime to existing employees
- 4) Whether any of the work can be performed by exempt employees, including the manager (without exempt employees losing their white collar exempt status under state and federal law)

If employers and their managers do not properly prepare, the risk can be great: Under federal law, employees can bring class action lawsuits claiming compensation for “off-the-clock” work and overtime for all similarly-situated employees. Employees who win such lawsuits can recover not only lost wages but also punitive damages and attorneys’ fees.

Here are several tips that companies can use to help managers prepare for managing newly overtime-eligible employees, and to avoid violating the law.

SET – AND ENFORCE – AN AFTER-HOURS COMMUNICATIONS POLICY

In lawsuits under the FLSA involving “off-the-clock” claims, employees must show that the employer knew or should have known that they were performing off-the-clock work, and therefore, that they are entitled to be paid for the time worked. When there is an email trail showing that a manager asked for the work to be done, it becomes much harder to deny knowledge or liability.

It is therefore important to establish clear policies about how and when managers communicate with non-exempt employees. Managers need to understand the potential financial consequences of asking employees to perform work outside of the regular business day, and should potentially limit after-hours communications with non-exempt employees to lessen the temptation for them to work off-the-clock.

If managers do call or email non-exempt employees “after hours,” they should make it clear that the employees are not expected to respond or complete the task until they are back on the clock, unless they expressly instruct otherwise.

Company policies should also say that non-exempt employees are not permitted to perform work outside of certain established working hours, including working overtime, unless they get clear advance permission in writing from their manager.

MOBILE AND SOCIAL MEDIA ISSUES

The ubiquity of smartphones, laptops, virtual desktops and remote access makes it very easy for employees to stay connected to their work 24 hours a day.

Therefore, consider implementing policies that limit off-the-clock use of mobile devices and virtual connectivity to approved times only, and make sure managers are trained and empowered to enforce these policies.

If practical, you might want to consider giving remote access only to exempt employees. It may also be beneficial to think about directing clients to exempt employees for after-hours communications and needs.

If your company has a BYOD (bring your own device) policy, many employees may have access to their work emails on their personal phones. Be aware that this increases the risk that non-exempt employees may perform (and potentially not report) overtime work. Consider excluding them from BYOD policies.

Also do not forget about social media use. It can be especially tempting to assign entry-level staff to monitor company social media accounts around the clock. But tread with caution: FLSA class actions may be brought by employees demanding compensation for off-the-clock monitoring of and/or posting to social media pages for or on behalf of their employer or the employer's clients. Employers should therefore have policies and trainings governing social media use, monitoring and posting on behalf of the company.

KEEP CALM AND KEEP IT AT A 'MINIMIS'

Companies should not fear the incidental emails or phone calls between a manager and non-exempt direct report off-hours. The law states that employers do not have to pay employees for such infrequent and/or negligible amounts of time spent working outside of working hours, referred to as "de minimis" time, which is hard to track.

Take the time now to get ready for December 1st so that you don't get caught off guard by the pending changes to the overtime laws. Significant risk can be avoided by advance preparation, starting with your managers.

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ABOUT THE AUTHOR



Jessica Golden Cortes is a partner in the Labor & Employment Practice Group of Davis & Gilbert LLP. Ms. Cortes counsels and litigates on behalf of employers in a broad range of matters including discrimination, retaliation, hiring and terminations, restrictive covenants, employment policies, social media, wage and hour, and federal and state family and medical leave laws. She regularly gives employee trainings on anti-harassment, anti-discrimination and social media issues, and has successfully defended clients in federal and state court, before the EEOC and state and local administrative agencies. She may be reached at 212.468.4808 or jcortes@dglaw.com.

