ADVOCATING FOR EMPLOYEES’ FREEDOM FROM THE 24-HOUR WORKDAY

A Plaintiffs Attorney’s Perspective

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Technology gives many employees the flexibility to work from wherever, whenever. Employees oftentimes believe that their smartphones and laptops will unchain them from their 9-5 work schedule, thereby giving them a better work-life balance. While it is certainly true that good has come from being able to work remotely, the flipside is that managers and customers know employees have the ability to be accessible 24-7 and, therefore, some have come to expect that. What we see now, in many industries, is the 24-hour workday which has created a bunch of workers walking around like zombies because they can never unplug. The following a plaintiff’s employment lawyer’s advice as to how to protect your clients from the 24-hour work week.

I. The Sad Statistics:

- 60% of employees who carry smartphones for work are connected to their jobs 13.5 or more hours a day on weekdays and about five hours on weekends, for a total of about 72 hours. This doesn’t leave many waking hours for anything but work.
- 87% of employees think it is ok to contact a co-worker after hours about a work matter.
- 60% of employees respond to work-related emails outside of work hours.
- 48% of employees handle work-related correspondence (text, phone, email) before they leave to go to work in the morning.
- 82% of employees have responded to work-related emails while on vacation.
• 53% of employees have responded to work-related emails while in the bathroom (!?!?!?!).

• 18 percent of employees have replied to a work-related email while driving¹.

II. Is This Good for Productivity?

a. Not even close.

b. John Pencavel at Stanford conducted a large study and found that employee productivity plummets after a 50 hour work-week and that someone who puts in 70 hours produces nothing more with those extra 15 hours. See http://ftp.iza.org/dp8129 for the complete study and white paper.

c. The government has even recognized the dangers in long work days and the Center for Disease Control dedicates an entire page to the health risks associated with working longer hours. See, http://www.cdc.gov/niosh/topics/workschedules

i. Note: this could be a very helpful resource for attorneys representing clients in certain professions.

III. Whose Fault Is This?

a. Both employers and employees.

b. Employees love their devices because they grant them greater flexibility in where and when they can accomplish their work but many seem psychologically unable to unplug even when their employers do not require after hours communication.

c. Managers who, themselves, choose to work long hours trickle that choice down by sending emails and texts to their subordinates at all hours. Subordinates, in turn, feel as if they must respond timely.


IV. Using the Law to Shield Your Clients.

a. Aside from some industry-specific safety regulations, most employees are surprised to learn that there is no overarching law that limits the number of hours in a day or days in a week an employer can force them to work.

b. But, the Fair Labor Standards Act mandates overtime for non-exempt employees who work more than 40 hours per week.

i. Many non-exempt employees think that firing off a quick text or email response after hours is not working “overtime” but that is not necessarily the case.

ii. It is true that “de minimis” work or insignificant periods of time are treated as non-compensable under the FLSA. 29 C.F.R. § 785.47. But, consider the sheer number of communications to which employees respond on their devices. These text messages and emails considered in the aggregate may very well amount to substantial and compensable work time for employees. *Id.*

1. Remember: even if an employer does not mandate after-hours responses or even if the company has a policy against them, if the manager knows the after-hour communications are happening and turns a blind eye, the time is compensable. 29 C.F.R. § 785.11.


1. Allen and a number of other non-exempt police sergeants brought suit for overtime pay associated with fielding after-hours text messages, emails and phone calls.

iv. What would bar a non-exempt employees’ claim for overtime?

a. If an employer has a clear policy prohibiting employees from responding to work-related communications after hours and the managers actually follow that policy, if an employee chooses to respond to communications after hours that time will most likely not be compensable.
v. Excitement on the Horizon!

1. The Department of Labor has proposed new regulations which would mandate overtime for anyone, regardless of position, earning less than $50,400 per year.

2. That’s going to make a whole lot of new folks eligible for overtime. And a lot of these people will fall within the professional or administrative roles that, oftentimes, carry smartphones and are expected to respond to communications off the clock.

V. Less Obvious (Creative) Legal Claims That May Be Used to Help Clients.

a. Disparate Impact: Does an employer’s expectation for 24-hour availability disparately impact certain groups? Consider for example:

   i. Parents/Caregivers who might not physically be able to respond during certain caregiving hours.

   ii. Religious employees who take Sabbath.

   iii. What about people with disabilities who can work normal hours but who either need time for treatment or rest because of their conditions?

b. FMLA:

   i. emails and text messages to an employee on full-time or intermittent FMLA leave may constitute interference with his or her rights under the statute.

c. ADA Accommodation/FMLA Leave:

   i. We see multiple clients each month who come to us on with very real physical or mental health issues related to having, quite literally, no break from work. As the CDC warns, long working hours can hurt people and make them sick—sometimes even fatally so. If you have a client like this consider helping them request an accommodation or FMLA time to get the break they need so that they can return healthier and more productive.
VI. Conclusion.

At the end of the day an exhausted employee is an ineffective employee. And constantly running on empty will hurt an employee—mentally and physically. If you have a client who has reached his or her limit with respect to the expectation of being always “on” consider the above to help them gain relief.