ABA Annual Meeting

The 24/7 Workplace and Its Ramifications

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Moderated by:

Barry A. Hartstein
Littler Mendelson, P.C., Chicago

Speakers:

• Kristin M. Case
  The Case Law Firm LLC,
  Chicago, IL

• William Long
  U.S. Department of Labor, Wage
  & Hour Division, Chicago, IL

• Susan M. Matta
  Carmell Charone Widmer Moss &
  Barr Ltd. Chicago, IL

• Debra L. Nahrstadt
  BP America, Inc., Naperville, IL
Agenda

- Wage and Hour Issues
- Discrimination and Harassment
- Employee Safety and Health (e.g. driving and mobile devices)
- Personal Privacy Concerns
- Data Privacy and Security
- Document Preservation and Discovery – Impact on “Dual Use” Devices
Wage and Hour Issues
Smartphones dial up OT headaches

After-hours calls, emails may be the norm, but litigation is a risk

BY ALEXIA ELEJALDE-RUIZ | Chicago Tribune

Jeffrey Allen answered his work BlackBerry during Thanksgiving dinner, during his son’s soccer match, on any number of Saturday afternoons. The phone would buzz with work-related texts, emails and calls from the time he woke until he headed to bed — and, with it always in reach, he would respond.

“I just saw it as part of the job,” said Allen, 51, a Chicago police sergeant.

But it was not a part of the job he was paid for, Allen alleges in a class-action lawsuit against the city of Chicago filed five years ago that heads to trial next month. He and about 50 officers who have joined the suit seek overtime pay for off-duty hours spent monitoring and responding to work emails and phone calls on their company-issued mobile devices.

Anyone familiar with the ping of a late-night email, a weekend call from a boss or a mid-dinner glance at a text message has felt the inescapability of work in the age of smartphones. But while constant connectedness has become the norm, it has also become a source of overtime litigation — and attorneys say that could increase under a proposal from the Obama administration to make millions more salaried Americans eligible for overtime, including many in managerial positions.

“As managers, they are more likely to be checking in during off hours,” said Phillip Schreiber, a Chicago-based employment lawyer at Holland & Knight who represents businesses and is not involved in the police suit.

The new overtime rule proposed by the Labor Department last month would raise to $50,440 the minimum salary an employee must make before they can be classified as exempt.

Turn to Overtime, Page 8
Selected Statistics:

- 60% of employees who carry smartphones are connected 13.5 or more hours/day
- 87% of employees think ok to contact worker after hours about work
- 60% of employees respond to work-related emails outside of work
- 48% of employees handle work-related correspondence (text, phone, email) before leaving for 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% of employees have replied to work related email while driving

Wage and Hour Issues

- Accessing email or making/receiving work-related calls outside of working hours.
  
  Review "de minimis" test and limits

  See e.g. Allen v City of Chicago, Case No. 10 C 3183 (Filed: May 24, 2014 and trial scheduled for Aug. 17, 2015). Collective action based on claim that employees were not paid for overtime compensation for work performed on BlackBerry devices outside normal working hours;

- Unique Industries – FLSA Application to 24 / 7 workplaces (e.g. Firefighters) – Review limits/ Impact of Collective Bargaining Agreements / Other Lessons Learned

- Telecommuting

- Dealing with employees on leaves of absence (e.g. disability, maternity, etc.)- Issues involving both non-exempt and exempt employees

- Selected Policy-Related Issues
**Wage and Hour Issues**

*Allen v City of Chicago*, Case No. 10 C 3183 (Filed: May 24, 2014 and trial scheduled for Aug. 17, 2015)

**Issue:** Collective action based on claim that employees were not paid for overtime compensation for work performed on BlackBerry devices outside normal working hours; plaintiffs allegedly required “to be on-call 24 hours, 7 days/week so they could access work related emails, voicemail and text message work hours regardless of location.

- Employer work order that department members were not obligated or required to access, respond to electronic communications and/or carry the devices on their person while off duty
- Allegation that actual practice was that department members were obligated to respond to supervisor emails and immediately respond
Wage and Hour Issues

“De minimus” work or insignificant periods of time are treated as non-compensable under the FLSA. 29 C.F.R. Sec. 785.47

Courts typically look at 4 factors:

- practical administrative difficulty of recording such time;
- the amount of daily time spent on the work;
- the regularity of the additional work; and
- the aggregate amount of compensable time.


“Suffered or permitted to work” – FLSA standard. Even if employer does not mandate after hours responses or has a policy against, if the manager knows after hour communications are occurring and turns a blind eye, the time may be compensable.

29 C.F. R. Sec. 785.11
Wage and Hour Issues

Policy Issues:
1) Query re requiring prior written authorization to work remotely via mobile device
2) Timing of responding to after-hours emails
3) Dealing with leaves of absence (non-exempt and exempt employees)
   (Query re de-activate employee connection to data or reconfigure so directed to others while on leave)
4) Tracking time worked outside regular working hours
5) Consequences for failing to comply with policy
6) How to deal with the 24-7 Manager
7) Paying for dual use devices and/or expenses (e.g. various state laws, Cal Labor Code 2802 – broad requirement to reimburse for all business expenses)
8) Review Telecommuting Policies
Discrimination and Harassment
Off-Duty Discriminatory Conduct

Communications in private social media - how to draw the line between conduct that is private and conduct creating a hostile environment for co-workers.

Illustrative are the following:

- Blakey v Continental Airlines, Inc. 751 A.2d 538 (N.J. 2000);

Sexual, disability and racial harassment complaints based on comments on internet message board, blogs and website outside work viewed as actionable claims creating exposure for employers.

Discrimination and Harassment

Telecommuting
See *EEOC v Ford Motor Company*, 783 F. 3d 753 (6th Cir. April 10, 2015)
6th Circuit rejected ADA claim in which disabled employee requested telecommuting 4 days per week in circumstances where on-site interaction was essential function of job.
Employee Safety and Health
Employee Safety and Health

- Driving and mobile devices
- Telecommuting Issue
Privacy Considerations
Privacy Concerns

Personal Privacy

- Growth of password protection laws by states around the country restricting employers from requesting personal log in credentials.
- Balancing test with “dual use” devices and based on other compelling interests. Greater limits with personal devices!!

Privacy and Data Security

- Care must be taken based on Stored Communications Act (SCA), which prohibits *unauthorized* access to email stored at an email service provider.
- Federal Computer Fraud and Abuse Act (CFAA) makes it a criminal offense to gain *unauthorized* access to a computer.
- Importance of employee agreement with “dual use” devices. (e.g. cell phones, I-pads, etc. used for work and personal matters). Restricting access, security features.
Document Preservation / Discovery Related Issues
Focus on “Dual Use” Devices

- Document Preservation/Litigation Holds
- Discovery of Personal / Dual Use Devices
Questions?
Thank You!

Barry A. Hartstein
Littler Mendelson, P.C., Chicago

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