



managing a work force

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On and Off the Clock

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What exactly constitutes work? When are employees on the clock, and when are they off? How do you compensate employees for work-related tasks in a 24-7 mobile workplace?

Today's business environment raises these and other questions for employers struggling to adapt to new technology and a business climate that includes fewer workers and increased competition.

Common concerns

Mainstream organizations are not the only employers uncertain about how to proceed in the face of change. Savvy, high-tech companies are among the employers challenged by these issues.

The Wall Street Journal recently reported on a federal lawsuit involving wireless service provider T-Mobile USA. In July, the company was sued by current and former employees who claimed they were required to use company-issued phones to respond to email messages after hours.

Indeed, mobility is at the heart of the legal matter in other wage disputes, including another cited by The Wall Street Journal that involves a former maintenance worker for CB Richard Ellis Group Inc. who received and responded to messages after hours on a company cell phone.

Meanwhile, ABC News reports on a pending case involving a Verizon employee who seeks overtime pay for time spent while on call.

Clocking hours

The issue of on and off the clock applies largely to hourly workers, employees for whom hours engaged in work-related tasks are associated with financial compensation.

What should employers do to ensure that don't find themselves in a situation where work performed by hourly employees after-hours becomes an issue?

"Employers should use a computerized time-keeping system when possible to help prevent claims that employees are 'fudging' handwritten time records. Employers may also consider getting employees to verify the accuracy of their time reports on a regular basis," says Wendy E. Lane, an attorney with Rutter Hobbs & Davidoff who specializes in business and employment counseling, litigation, and dispute resolution.

But attention to policy is important as well, according to Lane.

"Employers should also have a written policy, signed by employees, which states that non-exempt employees are prohibited from working 'off the clock' and that employees who violate this policy are subject to disciplinary procedures," she tells *HRWire*.

Although these steps establish guidelines, Lane recommends going further. "In addition to having the policy, employers should enforce it," she says.

What's more, the responsibility for monitoring compliance should not only fall to HR. "Where employees work in shifts, managers and supervisors should be trained to regularly check in with their departments to see whether employees appear to be working before or after their shifts," Lane says.

Determining status and solutions

Attention should also be given to employee status. "Employers should have written job descriptions for exempt as well as non-exempt employees, and should further consult with an expert on employment law to make sure that employees designated as exempt really do have duties that support their designation as exempt," Lane says.

Determining whether an employee is properly designated as exempt or non-exempt is a multi-factor analysis, she tells *HRWire*, indicating that too many employers have the misperception that all salaried employees are exempt, when the issue of whether or not an employee is salaried or paid hourly is only one of many factors to consider in designating an employee as exempt or non-exempt.

Similarly, employers should not make assumptions regarding compensation for hours worked. For example, a company might decide to offer comp time instead of pay for extra hours worked. But Lane points out that this seemingly innocent solution can land the employer in hot water.

"Under California law, an employer in California is not permitted to offer compensatory time off to non-exempt employees in lieu of paying overtime except for certain rare exceptions. Employers in other states should consult with an employment attorney or expert as to the laws in their state. Under the federal law, the Fair Labor Standards Act, there are rigid limitations as to when comp time is allowed," she says.

Compensatory time off does not apply to exempt, salaried employees, she tells *HRWire*, and, as a matter of fact, offering comp time to salaried workers can create problems. "It is likely that providing an exempt employee with formal compensatory time off would destroy his or her exempt status," Lane says.

Be that as it may, employers do come up against compensation issues, even with exempt staff members. Employees often take it upon themselves to work extra hours, at night, on weekends, and on vacation. Although there is no formal agreement regarding compensation, there may be an expectation that financial reward will be forthcoming, in the form of a bonus or a raise.

Lane therefore recommends that employers clearly define work requirements as they relate to compensation. "Exempt employees are paid to get the job done, even if that means working extra hours," she says. "Employers can avoid misunderstandings regarding compensation for exempt employees by clearly stating in writing what the employee's salary will be. The employer should also put in writing its policies regarding the factors considered in awarding bonuses and raises and whether such additional compensation is guaranteed or discretionary."

Meanwhile, because employers must pay non-exempt employees for all time worked, including time spent working while home sick, on weekends, and on vacation, different standards apply. "The employer is setting itself for a wage and hour lawsuit if non-exempt employees are engaging in off-the-clock work on their phones, BlackBerries or home computers," Lane says. "The employer should make clear to non-exempt employees its policy that it will pay non-exempt employees for all hours worked."

Furthermore, she says employers should not require non-exempt employees to check voicemail or email or otherwise work while "off the clock" unless the employee reports that time and is paid for that time worked.

But what happens if the job of a non-exempt employee demands this kind of attention? "If an employee's job frequently requires working extended hours, the employer should consider whether the employee's job duties qualify him or her to be classified as a salaried, exempt employee," Lane says.

Work day, work night

As more people work from home on a full- or part-time basis, and companies emphasize results as opposed to hours worked, employers are less inclined toward clock watching. Add technology to the mix and it can be easy for employers to lose track of fundamental distinctions between exempt and non-exempt employees.

These factors actually increase the likelihood of wage disputes among non-exempt employees, according to Lane. And employers that don't monitor hours worked can get blindsided. "A non-exempt employee who fails to report the time they spend checking emails and voicemails on weekends and on vacation may not report that time or seek payment while they are happily employed, but may turn around and file a claim for unpaid wages in the event the employment relationship terminates," Lane tells *HRWire*.

And what about those other employees, the ones who are not paid by the hour but are paid to get the job done?

"Because exempt employees are salaried rather than paid by the hour, they are often expected to work longer hours and on weekends, etc., and it is not illegal for employers to require those employees to do so without extra pay," Lane says. "However, from a

morale and efficiency standpoint, employers should still encourage exempt employees to take regular work-free breaks and vacations to avoid burnout."

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