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JUNE 26, 2020

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# RUSHED TRANSITION TO WORK-FROM-HOME WILL LIKELY LEAD TO INCREASE IN FLSA WAGE-AND-HOUR CLAIMS

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Companies are increasingly asking employees to work from home to reduce spread of the novel coronavirus and associated risks of the virus. Indeed, we are all experiencing a seismic shift in the way that we work. Working remotely can certainly help reduce the virus's spread. But, it is important for employers to understand that shifting to a work-from-home mandate comes with some of its own unique legal risks. In particular, telecommuting creates a higher risk that companies will inadvertently violate the Fair Labor Standards Act, which mandates payment of overtime for hourly non-exempt employees.

Work-from-home presents a minefield of challenges in maintaining FLSA compliance. Indeed, it is very difficult for employers to monitor and know for sure how many hours employees are working while out of the office. The necessity for a rushed transition to remote work that COVID-19 has imposed will almost certainly lead to a surge in FLSA wage-and-hour lawsuit filings against employers. Thus, it is essential that employers recognize this problem, identify common exposure points and develop policies to reduce their risk.

Some examples of problems that are likely to give rise to FLSA claims include:

**Time Spent On-Call, After-Hours Contact on Work-Provided Cellphones, Boot-up Time**
Time spent "off the clock" is the leading cause of liability in wage-and-hour matters. These issues must be reviewed case-by-case, but we expect that many employees will make claims in this category relating to their time working remotely. A touchstone example in this category would be a non-exempt employee answering e-mails after hours at their supervisor's direction or with the supervisor's implied approval. Unlike walking in and out of the office, working remotely prevents a clear cutoff to the work day, and many employees may well claim that they spent time off-the-clock performing compensable work in this category.

**Deductions for Breaks/Meals**
While federal law does not require lunch or rest breaks, it does address when these breaks are counted as hours worked. Rest breaks lasting between five and 20 minutes are generally compensable time. Lunch breaks lasting at least 30 minutes are generally not considered compensable time. If, however, an employee is not completely relieved of their work duties during the lunch break, that time is compensable under the FLSA. Working remotely has caused blurred lines for many people between their home life and work life, which may well include working during their lunch.

**Misclassification**
Less tied to Covid-19 but so common that it bears mentioning is misclassification of employees as exempt. There is a common misconception that a salaried employee is automatically an exempt employee, which is not accurate, and it may be time for an FLSA audit to ensure that your company is correctly classifying lower-level salaried employees.

**Recommendations:**
It is extremely important that employers set clear expectations about the time of day that employees need to be reachable, the work they are expected to produce, the frequency and method by which they should communicate and how long they may telecommute. Employers should work with legal counsel experienced in these matters to prepare new policies setting clear boundaries on work time, procedures, etc. while working from home, and require employees to sign. Furthermore, based on recent Supreme Court case law (Epic Systems v. Lewis), employers should ensure they have included class action waivers in their agreements to avoid potentially large exposure to FLSA wage-and-hour class and collective actions. Given the expectation of further increases in FLSA-related actions, and the steep penalties for violations, it is imperative that companies take this issue seriously.

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# OFF-DUTY CONDUCT CAN LEAD TO ADVERSE EMPLOYMENT ACTION, BUT CAUTION IS ADVISED

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The past several months have seen a record number of Americans taking to the streets and to social media to protest state and local COVID-19 protocols and systemic racial injustice. In some instances, that activism has seeped into the workplace with, for example, employees refusing to work due to real or perceived COVID-19 risks, or walking off the job to protest an employer's support of law enforcement. In some situations, employees have been caught on video engaging in threats and acts of violence or property destruction or looting. Others have posted polarizing, offensive and sometimes hateful comments—including about their employers or co-workers—on social media.

Private sector, non-union employers in Ohio have great legal latitude to discipline or terminate employees for their conduct, both on and off duty. Criminal acts of violence or property destruction often result in immediate termination. But, in the current, highly charged climate, we advise caution, patience and flexibility before exercising such discretion, especially where an employee engages in non-violent forms of protest.

Legal claims for wrongful termination and retaliation are on the rise across the country. So, ask yourself: is it worth risking litigation to terminate an employee for being too afraid to come to work, for criticizing the employer on social media or for supporting a political or social movement the employer does not support even if the decision is lawful? In today's world, where our collective distress over an invisible and deadly virus, police brutality and systemic racism are colliding at once, is the better approach to pause and listen before acting? An employee's off-duty conduct may provide an opportunity for meaningful dialogue about an issue that is likely important to more than one employee. Similarly, showing tolerance for different social and political viewpoints can improve employee loyalty and retention over time. Today, even when off-duty conduct hits a nerve, employers likely will be better served to temper knee-jerk reactions and, instead, to have the hard conversations with their employees that may lead to real and lasting change, both at work and in the community.