

## Failure to pay wages? Now there's an app for that

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The U.S. Department of Labor recently launched a timesheet application for smartphones (commonly referred to as an “app”). The department describes the app as “a timesheet to help employees independently track the hours they work and determine the wages they are owed.” The concept seems harmless; the reality, however, is more complicated. When the app is viewed in light of the department’s mission, public statements and actions, employers should view it with something of a jaundiced eye. By creating its own app, the department has possibly demonstrated its implicit encouragement for employees to file wage-and-hour complaints against their employers.

The app allows each user to track regular work hours, break times and any overtime hours that they work for multiple employers at any given time. The app can then create a precise spreadsheet showing the wage calculation for any specific period of time. It even has a convenient function that allows the user to “email the summary of work hours and gross pay as an attachment.” The app also provides a “[g]lossary, contact information and materials about wage and hour laws through links to the Web pages of the department’s Wage and Hour Division.” According to Secretary of Labor Hilda L. Solis, “This app will help empower workers to understand and stand up for their rights when employers have denied their hard-earned pay.”

The app can also assist employees in tracking time worked while not on the employer’s premises. Too often employers fail to account for the time their employees are working out of the office. With emerging technologies, employees are spending an ever-increasing amount of time responding to emails, text messages and the like. Of course, if these hours are not captured and compensated by the employer, then the employer could be on the hook for back pay as a result of any disparity between the employer’s records and the employee’s app reports.

The fact that the Department of Labor devoted, and is devoting, significant resources to creating and maintaining this app sends a clear message: It perceives that a substantial number of employers fail to keep accurate records. Accordingly, the department is encouraging workers to maintain a parallel and possibly even a secret set of records. Solis explained that the app’s purpose is to ensure that “workers receive the wages to which they are entitled.” The app underscores the need for employers to be vigilant in their record-keeping policies and practices. When employers fail to maintain accurate time records, the employee’s records, including the records generated by using the app, become key evidence in an investigation. The department will likely give substantial credence to the employee’s parallel app records.

The app is only the latest development in the Department of Labor’s pursuit of wage violations. The department recently partnered with the employment plaintiffs’ bar to assist it in suing employers for violations, calling the partnership a “bridge to justice.” Solis described this joint effort as “another tool [that employees] can use to ensure a fair and secure future.” In addition, “350 new investigators.” have been acquired by the department. With these various “tools” in hand, wage-and-hour violations are going to be investigated and prosecuted.

Thus, employers found to have committed wage-and-hour violations will suffer costly consequences. Federal and state wage-and-hour laws allow for back wages, overtime, back benefits, penalties, back taxes and attorney fees. Under the Fair Labor Standards Act, for example, the Department of Labor can look back, in some cases up to three years, to determine back pay and damages.

Given the high stakes – and the technological watchdogs such as the new app – employers should consider taking several steps to ensure they are properly classifying

and vigilantly maintaining accurate employment and payroll records. If there is a problem, or an employer thinks there might be a problem, there is no better time for an employer to conduct a self-audit than now. This audit should consider and look at several factors, including the following:

Ensure that policies comply with federal and state wage and hour laws.

Ensure that all of the time employees spend providing services – including off the employer’s premises – are counted toward hours worked.

Craft policies that have a requirement that if an employee’s time records – including records generated by the app – are different than the employer’s time records, that the worker is obligated to immediately report the disparity to ensure accurate payments.

Craft overtime policies that explain and limit when non-exempt employees can work overtime.

Craft and ensure that the record retention policy is accurate and that the records will be sufficient to withstand a dispute with an employee or the Department of Labor.

Ensure employees are not being allowed to work extra unrecorded hours by performing unrecorded work either outside of the workplace, at the workplace before or after their work day is scheduled to begin or end, or over an unpaid lunch hour.

Ensure employees take any legally required meal and rest breaks.

When dealing with employment classifications and potential audits by the Department of Labor, an ounce of prevention is worth, at least, a pound of cure.



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