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Briefly

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CURRENT BASIC MINIMUM WAGE AND OVERTIME REQUIREMENTS

Carol R. Merchant

"A fundamental premise under the Act is that all employees are covered by both the minimum wage and overtime requirements unless the employee specifically meets all of the requirements for a specific exemption."

At its core, the Fair Labor Standards Act (FLSA) requires employers to pay non-exempt employees' wages equal to, or greater than, the federal minimum wage rate. The Act also requires employers to pay non-exempt employees overtime wages equal to one and one-half times the employee's "regular rate" for all hours worked in excess of forty (40) per work-week. Currently, the federal minimum wage is $7.25 per hour.

One of the most fundamental concepts in wage-hour law is the distinction between "non-exempt" employees and "exempt" employees. To say that an employee is "exempt" typically means that he or she meets one of the exceptions to the minimum wage and/or overtime requirements of the Act. A fundamental premise under the Act is that all employees are covered by both the minimum wage and overtime requirements unless the employee specifically meets all of the requirements for a specific exemption.

Exempt Employees

The most common exemptions include the so-called "white collar" exemption. This provision exempts from both the overtime and minimum wage requirements employees who perform work in an executive, administrative, professional or computer employee capacity and who are paid on a salary basis. Most employers try to qualify their supervisory personnel under this exemption in the capacity of an executive. For an employee to qualify for the executive exemption, all of the following requirements must be met:

1. compensation on a salary basis at a rate not less than $455 per week;
2. whose primary duty is management of the enterprise or a customarily recognized department or subdivision of the establishment;
3. who customarily and regularly directs the work of two or more employees; and
4. who has the authority to hire or fire other employees or whose recommendations as to the hiring, firing, advancement, promotion, or other status change are given particular weight.

There are different duty requirements that must be met for an employee to be exempt as an administrative, professional or computer employee.

While the current salary requirement is only $455 per week, or $23,660 per year, the Obama Administration proposed in a regulation raising this annual compensation level to $47,476. This higher salary level regulation has been enjoined by a court, and many expect the new administration to eventually raise the annual salary requirement to a middle level of around $33,000. As of the time of this publication, however, the minimum salary requirement of $23,660 remains in effect on the federal level.

Non-Exempt Employees

Regardless of how an employee is paid, his or her compensation must be converted to his or her "regular rate" of pay. Unless the employee is otherwise exempt, his "regular rate" of pay must equal or exceed the minimum wage, and he must be paid overtime wages equal to one and one-half times the "regular rate" for all hours in excess of forty (40) in a given "workweek." A "workweek" is defined as any consecutive seven (7) day period. Employers may start their "workweeks" on any given day, e.g., a Thursday to Wednesday, but may not change "workweeks" once established if that change is done to avoid paying overtime. One may certainly have different work-weeks for different facilities or business units. An employer may change its work-week but only if it is clearly done with no intent to evade paying overtime. A person's "regular rate" of pay is their weekly compensation expressed as an hourly rate regardless of how the employee is actually paid. Obviously, the "regular rate" for an employee who is solely paid on an

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hourly basis will be that hourly rate. If an employee is paid on some other basis, e.g., a piece rate, a salary, commission, hourly rate plus commissions or other form of payment, then his or her "regular rate" will be determined by dividing his or her total compensation (before additional half-time is calculated) by his or her total hours worked during the workweek.

Once an employee's "regular rate" is determined, he or she is entitled to overtime pay equal to one-half of his or her "regular rate" for all hours worked in excess of forty in the workweek. Employers may not average workweeks; each workweek stands alone, regardless of how often the employee is paid.

If the individual's salary is intended to compensate them for all hours worked, then their "regular rate" is the salary divided by the actual hours worked during the workweek. Under this methodology, the employee would be owed overtime for any hours beyond forty (40) at a rate of one-half the "regular rate." Under this method, the employee's "regular rate" will fluctuate depending upon the actual number of hours worked in each workweek. This method of pay is called the fluctuating workweek method of payment.

Hence, it is important to make it clear to non-exempt employees just what precisely their salary will cover. Typically, employers mean for the salary to cover all base hours worked; that needs to be made clear to the employee upon hiring. It is strongly suggested that employers should document the fluctuating workweek method in order to avoid any disagreement or misunderstanding between the employer and employee. This documentation should also be helpful in the event of a wage-hour investigation by the U.S. Department of Labor. It should also be noted that the employee must receive their full salary for any week in which they perform any work. No deductions may be made from the salary for absences.

ON-CALL TIME

Employees must be compensated under the FLSA for all hours worked. The issue becomes more complex, though, for "on-call time." Essentially, time spent waiting for work is compensable if it is spent "primarily for the benefit of the employer." If the time spent is primarily for the benefit of the employee, then the time is not compensable. In essence, courts will examine how much control the employer has over the activities of the employee during the time period in question versus how much freedom the employee has to pursue his own activities.

Obviously, being on-call restricts, to some degree, the freedom the employee has to effectively use the time. Typically, the amount of time an employee has to respond to the call—and that alone—does not make on-call time compensable. A *Wage and Hour Interpretative Bulletin* states, "an employee who is not required to remain on the employer's premises but is merely required to leave word at his home or with company officials where he may be reached, is not working while on-call." Time spent actually responding to calls is, of course, compensable.

The use of beepers and cellular telephones has given employees a greater ability to effectively use on-call time for their own use. Thus, an important factor in the analysis is the length of response time given to an employee. A five-minute response time would severely restrict an employee's freedom and would support a finding that the on-call time is compensable. However, there can be limited circumstances where such short time to respond is not a controlling factor.

In this age of technology where one can utilize their devices, e.g., cell phones, smart phones, to have a great deal of freedom of movement and broad activity, time spent being on-call is normally not compensable. The employer should give the employee a reasonable amount of time to report to work if necessary (30 to 60 minutes). On the other hand, requiring an employee to be on the job in 15 minutes from the time the employee is notified through his electronic device will likely, depending on the circumstances, result in the on-call time being compensable. Since the agreement between the employer and employee can be part of the analysis, it is helpful for the employer to have its policies in this regard in writing.

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THE SIGNIFICANCE OF HAVING A SOCIAL MEDIA POLICY AND A CELL PHONE POLICY

Mary C. Moffatt....

"[W]hat can an employer do to try to avoid public embarrassment and scrutiny due to the social media posts of its employees?"

Social media is a great thing. How else would we be able to keep up with friends and family -- what they are doing, where they are going, and, of course, what they are eating? Some people also like to use social media to let others know what they are thinking—on just about any topic, including current events. However, when comments on social media contain racist, sexist, or other language that evidences discrimination against a protected group, can the person's employer take action against the employee for such comments? The answer can be found in news reports:

- Three Columbia, SC firefighters were terminated for Facebook posts that were deemed racist.
- A firefighter in Savannah, GA was fired for a derogatory Facebook post.
- A court security officer was fired in Lexington County, KY for a racist Facebook post.
- Two Nashville, TN police officers have been decommissioned within a week of each other for posts on their personal Facebook accounts.

In many cases, the social media posts are brought to the attention of the employer or, even worse, the news media, because the employee has listed the name of his/her employer on his/her personal social media page.

Short of the tedious and time-consuming task of monitoring every employee's social media posts all the time, what can an employer do to try to avoid public embarrassment and scrutiny due to the social media posts of its employees?

1. Conduct regular training on the Company's *Policy against Discrimination and Harassment*. Such training should be done annually, at a minimum. Consider an outsider to conduct the training because that can have a greater impact than someone within the Company who sees the employees on a daily basis.

2. Train supervisors to make it a practice regularly to remind employees at meetings about the Company's commitment to its Policy against Discrimination and Harassment.

3. Implement a social media policy. In drafting a social media policy, you should consider the following:

- Remind employees that company policies apply to online conduct. Specifically, remind them that policies, including EEO (Equal Employment Opportunity) and confidentiality policies, apply to employees' social media activity. Further, you should detail the type of posts that the company prohibits (such as threatening or obscene posts). Invoking other policies in conjunction with specific provisions of the *Social Media Policy* can also lend specificity to its terms.
- Address work usage. Inform employees whether they are permitted to access social media at work and under what circumstances.
- Protect intellectual property and proprietary and confidential information. With respect to intellectual property, the policy should inform employees about intellectual property rights and encourage them to abide by relevant legal requirements. With respect to confidentiality provisions, be specific about the type of information covered and do not define confidential and proprietary information to include wages or other information related to the terms and conditions of employment.
- Distance company from employee. To reduce the risk that a company will be faulted for employees' bad behavior online, you should advise employees that they may not state the Company has authorized them to speak on the Company's behalf unless they receive prior written authorization.
- Consider employees' privacy rights. The social media guidelines that you establish must balance the legitimate business interests the employer seeks to protect with employees' privacy rights. You should ensure that employees have no expectation of privacy in publicly available social media postings. Be aware that some states (such as California, Colorado, New York and North Dakota) ban discrimination which is based on lawful activity by an employee off the premises.
- Consider employees' Section 7 rights under the National Labor Relations Act (NLRA), which applies to both union and non-union employers. Section 7 of the NLRA provides employees with the rights to organize, bargain collectively through chosen representatives, and engage in concerted activity for collective bargaining or other mutual aid of protection. During the Obama Administration, Section 7 was interpreted to give employees the right to photograph and make recordings in furtherance of their protected concerted activity, including the right to use personal devices to take such photographs and make such recordings at least on non-work time. Since 2010, the National Labor Relations Board (NLRB) had been devoting considerable attention to the social media policies of all employers (both unionized and nonunionized workforces) to determine whether they impinge, or could be construed to impinge, on employees' Section 7 rights.

The NLRB has made the following points regarding social media policies:

- Employer policies should not be so sweeping that they prohibit the kinds of activity protected by federal labor law,

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such as the discussion of wages or working conditions among employees.

- An employee's comments on social media are generally not protected if they are mere personal gripes not made in relation to group activity among employees.
- Employers should avoid broadly prohibiting employees from using the employer's logo or name in non-work related social media communications. Such action may be deemed to infringe upon employees' Section 7 rights. Instead, employers should consider narrowly tailoring any restrictions on the use of the corporate logo to prevent improper use. Some Obama-era NLRB rulings have suggested that employees can post pictures of the workplace on social media, at least absent unusual circumstances, such as security concerns.
- Policy language that is general or establishes subjective standards, such as "confidential" or "inaccurate information," could raise red flags unless accompanied by examples that make it clear to a reasonable employee that the general language is not intended to encompass protected speech.
- Employers should not expect that a disclaimer alone will save an otherwise overbroad provision in a social media policy, especially if that disclaimer is only general in nature and appears at the end of the policy.

4. Investigate any reports of inappropriate social media posts immediately and take action when necessary. You cannot prevent employees from expressing their opinions on social media. But when that expression crosses a line that violates the company policy against harassment and discrimination, and the company becomes aware of it, the company cannot simply ignore it; it must investigate and take action as it would in any situation where it learns of behavior that may be in violation of the company policy against harassment and discrimination.

CELL PHONES

A related issue is how a company should deal with the proliferation of cell phones in the workplace. As mobile phones have become more powerful and prevalent, they provide ample opportunities to distract employees from their work. The temptation to make personal calls, access the internet, or review and/or post to social media is hard to resist for even the most conscientious of employees, and these practices waste significant company money and time. More seriously, as more laws are enacted governing the use of cell phones on the road, employers may find themselves accountable for their employees' actions while driving. Thus, establishing and enforcing a cell phone policy has become increasingly important, both to ensure employee performance and to shield companies from lawsuits and other liabilities.

A well-crafted cell phone usage policy will not only set expectations for incoming employees, but will also address serious issues concerning the safety, security, and privacy of cell phone use. Some companies ban the use of cell phones during work time altogether, with some allowance for cases of emergency. Whatever policy is implemented, it needs to be enforced consistently.

The NLRB has also stepped into the picture involving the use of cell phones. During the Obama Administration, the NLRB ruled that employees have certain rights to use recording devices on company property, including audio, photography, or video recordings. The NLRB found that a blanket prohibition of using such recording devices would reasonably be interpreted by employees to prohibit recording concerted activities, such as documenting unsafe workplace equipment or hazardous working conditions, documenting and publicizing discussions about terms and conditions of employment, documenting inconsistent application of employer rules, or to record evidence to preserve for later use in employment-related legal actions. However, the case in question, *Whole Foods Market, Inc.*, 363 NLRB No. 87 (2015), dealt with rules prohibiting recordings, as opposed to a rule simply prohibiting the possession of cell phones within the facility.

It would seem to be a legitimate employer interest to ban cell phones on company property, as a receipt of a phone call, text, or pager contact could create a safety hazard as well as a distraction from work. Such activities could occur during working time, thus interfering with work. However, some employees may feel or assert that they have a "right" to bring their cell phones into the facility. Indeed, the implication of the Whole Foods case is that the rationale extends to giving employees the right to bring recording devices such as cell phones onto the premises.

Whether the NLRB under the new administration will adhere to the rationale of the *Whole Foods* case is unclear, and an educated guess would be that at some point in the future the right of employers to ban the possession of cell phones within a facility should be allowed.

In any event, employers desiring to ban cell phones within the facility should give advance notice of the rule and the reasons for the rule. Those reasons might include the fact that these items tend to create distractions in the workplace and safety hazards, as well as the potential for interference with work. Even employers not banning cell phones from the premises may want to specifically refer to banning the use of cell phones during working time, as such distractions may interfere with work. It is important to use the term "working time" rather than some other term such as "working hours" as the latter term includes times that employees are not supposed to be working, such as break periods. The NLRB has held over the years that employees have the right to use non-working time for union organizing or other concerted activities, so proper terminology is essential.