



NEVER OFF THE CLOCK: THE LEGAL IMPLICATIONS OF EMPLOYEES' AFTER HOURS WORK

By Tanya Marcum, Elizabeth A. Cameron, and Luke Versweyveld

TANYA M. MARCUM is an Associate Professor of Law at Bradley University, Foster College of Business. Her work experience includes ten years as in-house legal counsel for the Internal Revenue Service and nine years teaching at Central Michigan University. She received a J.D. degree from the Thomas M. Cooley Law School and a B.S. degree in Business from Central Michigan University.

DR. ELIZABETH A. CAMERON is a Professor of Business Administration at Alma College. Dr. Cameron's research focuses on health care law and policy, consumer law, education law, and real property law issues. She received a J.D. degree from Thomas M. Cooley Law School and M.B.A. and B.B.A. degrees from Saginaw Valley State University.

LUKE VERSWEYVELD is a 2018 graduate of Bradley University majoring in Management with a concentration in business law.

Abstract

Technology has forever changed the work life of employees in many positive ways such as increasing efficiency, accumulating better records and data, and providing instant communication. However, technology has also altered when, where and how often employees work. For many employees, the work day never ends as employees bring home projects, respond to emails, write reports, return phone calls and conduct research. Some workers are never off the clock as they continue to work after hours at home resolving work matters using technology. What has added convenience to our lives is destroying employee work-life balance and is creating potential legal problems for employers while blurring the lines of work-time and personal-time.

The focus of this article is on Generation Y, or more commonly referred to as Millennials, who were born after the 1980s and entered the workplace in the 2000s. The Millennials are generally higher educated than previous generations, use social media and are competent users of information.¹ Millennials make up about 25 percent of the U.S. population.² Given this common description of Millennials, an “analysis of articles published in peer-reviewed journals reveals contradictory descriptions of Gen Y and their work-related attitudes.”³ A common description of Millennials is that they respect a work-life balance and seek a career that respects this balance.⁴ To complicate matters Generation Z, those born in mid-1990s to the mid-2000s are exiting college with unique views of work.⁵ Generation Z⁶ extensively engages in technology and is even more connected than Millennials. Many Millennials are not offended by answering emails and posting employer social media comments after hours, but they expect to be compensated for such time. The world is changing and employee access to technology and desire for immediacy is impacting their everyday work life.

I. Introduction

A 2015 study conducted in Britain provides “concrete evidence that happier employees are more productive in the workplace.”⁷ Positive workplace morale fosters greater productivity. There are both physical and psychological factors that impact employee morale.⁸ Employee morale involves the physical aspects

of the work environment such as comfort, lighting, restrooms, and other interior features.⁹ One of the primary psychological factors that play a role in employee morale is whether or not employees trust and respect management of the company.¹⁰ Employees who are well informed about matters of interest occurring at work also report higher job satisfaction.¹¹ According to one study, the most important factors when evaluating a job position by a prospective candidate is work-life balance and a flexible schedule.¹² Combining these factors with the values of Millennials and Gen Z workers, signals the need for employers to evaluate the expectation of employees to perform after hours work in a digital world.

II. The 24-7 Borderless Workplace: The “Electronic Leash”

For many employees, the workday does not end when they leave the office. In this age of technology, employees are constantly connected to their work through their cell phones, personal computers, tablets and various other technological devices. Employees in a myriad of professions receive electronic communications from clients, colleagues, and superiors at all hours of the day as well as weekends, holidays, and vacations. “Employees physically leave the office, but they do not leave their work. They remain attached by a kind of electronic leash, like a dog” said former French education minister, Benoit Hamon.¹³ The work does not stop when employees leave the office, should the pay continue after hours? Does being unleashed provide greater creativity and less stress? Are employees who have downtime and are unleashed more satisfied, more productive, and more healthy? Is this “leash” imposed by the employer or by the employees’ addiction to stay connected, or both? These questions are currently faced by employers in every industry around the world as it has become a contemporary workplace concern.

A. The Push back

One of the most significant cases involving off the clock communication is *Allen v. City of Chicago*.¹⁴ Jeffrey Allen, a member of the Chicago Police Department’s Bureau of Organized Crime, brought suit against his employer on behalf of himself and 51 other current and former members of the Bureau.¹⁵ The case was first heard by the Northern District of Illinois, Eastern Division District court, and was subsequently appealed to the Seventh Circuit Court of Appeals.

Allen filed suit claiming that the Bureau failed to compensate its officers for work done on their BlackBerry

devices outside of working hours.¹⁶ The process in which members of the police department obtain overtime compensation is through the submittal of “time due slips” to their supervisors.¹⁷ These slips typically did not identify the mode in which work was accomplished.¹⁸ Additionally, the section that lists the work completed was often vague. The plaintiffs claimed that the Bureau knew that work was being done on BlackBerry devices outside of working hours, promoted an environment that discouraged overtime work, and was aware that compensable work performed on mobile devices went uncompensated.¹⁹ The Bureau claimed that, in many instances, they were unaware that compensable work was not being recorded via the submission of slips.²⁰ The Bureau was also able to reference several instances where supervisors knowingly signed off on work done on mobile devices.²¹ A point of discussion was the “General Order” issued by the Chicago Police Department in October of 2010 (and re-issued with similar wording in 2013) which stated that work performed outside of working hours on their mobile devices would not be compensated except under limited circumstances.²² The district court concluded that these rules were seldom followed and “had no effect on plaintiffs of their supervisors.”²³

The district court ruled in favor of the defendants and the 7th Circuit affirmed the decision, as the plaintiffs were unable to substantiate their claim that the Bureau knew that the plaintiffs were performing compensable work without due compensation. This is not to say that this case is a loss for off the clock compensable work. On the contrary, the Seventh Circuit Court of Appeals discussed several tenants of the case that reinforces the compensability of work done on mobile devices outside of working hours. The court discussed the Bureau’s “General Order” at length, and concluded that “[the] language appears to run flatly contrary to the Bureau’s FLSA obligations.”²⁴ The court also cited the case of *White v. Baptist Memorial Health Care Corp.*,²⁵ which involved a similar situation as *Allen v. Chicago*.²⁶ This particular case involved a nurse who filed suit for not being compensated for work completed during her unpaid lunch break. Similarly to *Allen v. Chicago*, the court ruled in favor of the employer due to the plaintiff’s failure to submit the proper documentation required for compensation. The key difference between these cases was the work being completed. Comparing the work that members of the Bureau performed on their BlackBerrys to working through an unpaid lunch (a far more traditional example of compensable work) validates that this type of work should be compensated under the Fair Labor Standards Act [FLSA] regulations.²⁷ *Allen v. Chicago* has significant implications for the compensability of work done on mobile devices after routine work hours.

B. Off the Clock Communications

Just how prevalent is the issue of being able to receive communication 24/7? A 2012 survey conducted by the Center for Creative Leadership provides some shocking statistics:

60% of employees who have smartphones for work or personal use are connected to their jobs 13.5 hours on weekdays and another five hours on weekends via electronic communication. 87% of employees think it is acceptable to contact a co-worker outside of normal work hours concerning a work matter. 60% of employees respond to work-related emails outside of work hours. 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% percent of employees have replied to work-related email while driving.²⁸

Given this work occurring outside of compensated work hours, is there an actual increase in employee productivity? Studies suggest the opposite to be true. John Pencavel, Professor in the School of Humanities at Stanford University, conducted several studies pertaining to output at various levels of weekly hours.²⁹ Pencavel found that schedules of 60 hours or more were characterized by “decreased productivity and increased absences, accidents and labor turnover.”³⁰ Additionally, working 70 hours yielded no significant increase in output compared to a 56 hour workweek.³¹ These studies suggest that productivity would not decrease if employees were to adhere to a lighter workweek.

Although there may be no impact on traditional productivity, employees now live and work in an electronic world where they are accustomed to instantaneous feedback and communication around the clock. In addition, employees working on a global team often find that after hours communication better accommodates the global time differences with clients and offices. Technology has made it possible to do business with people across the globe. The increase in global business transactions often makes it difficult for the recipient to respond within the sender’s working hours. This can make compensation difficult for employers who are unwilling to pay hourly employees overtime. Perhaps flexible work schedules is the answer.

C. Technology is Inescapable

Millennials, particular those in their late teens or early twenties, grew up during a period of rapid technological advancement. The mobile devices that are currently being used are more powerful than many of the computers that millennials used in their early years. 2017 marked the

10-year anniversary of the iPhone, and now over 85% of millennials have smartphones.³² The next workforce group, Generation Z, has never lived without technology.³³

The age of smartphones has made it easier than ever to be in constant contact with friends and family as well as employee work groups. Today a smartphone is a handheld computer with the ability to fully function anywhere. Employees can access their work emails from several different devices, and studies show that they are doing just that.³⁴ 87% of millennials use 2-3 electronic devices at least once per day.³⁵ A relatively new device to hit the mainstream consumer has been the smartwatch. Smartwatches make it possible for communication to be as instantaneous as glancing down at your wrist. Smartwatch sales have skyrocketed in the last four years. In 2014, five million smartwatches were sold.³⁶ The forecasted sales for 2018 are a staggering 141 million.³⁷ The technological advancements over the last decade reflect a desire for millennials to be more connected. Such technology also permits employees easy access to work while on personal time such as the golf course while on vacation. One can only wonder what form of communications technology will be in existence in the next five years.

D. Regarding Personal Time During Non-Work Hours

Studies have shown that millennials favor work-life balance more than previous generations. 58% of millennials ranked the quality of the work environment higher than pay and financial benefits.³⁸ Twenty-eight percent of Millennials ranked work-life balance as the single most important factor for job satisfaction.³⁹ This would seem to be in opposition to the push to be more connected than ever. Technology has become a “double-edged sword” when it comes to work-life balance. Technology has enabled some employees to work remotely which provides the flexibility to work from home. According to a survey, 43% of Americans spent at least some time working remotely in 2016.⁴⁰ Working from home has helped many employees establish a better work-life balance, but it has also blurred the lines of when it is acceptable to expect, send and react to work communications after the work day has ended. In addition, some employees prefer to send or answer work communications after hours to expedite the next day’s work expectations, even against corporate policy. Also, this new found freedom to work at home presents potential liability for employers should the employee be injured while working from home.

Millennials and Generation Z employees desire a work-life balance but they also struggle with a technology

addiction manifested by a ringtone, buzz, song, or ding.⁴¹ This generation feels compelled to respond both from a compulsive perspective and from a desire to make the next day's work lighter. Protecting personal time during non-work hours is the responsibility of both employees and employers. This desire to check email and respond to phone messages has significantly increased since the early 2000s. "50% of email users say they check their work-related email on the weekends. Fully 20% say that they check their work email accounts "often" during weekend hours, compared with 16% who reported the same in 2002."⁴² Additional 34% of employees indicated that they check their email while on vacation and 11% reported that they checked email often.⁴³ Some of this technological activities occur off the clock as a result of employees' addictive impulses to stay connected and workaholic tendencies. However, "one in five employed email users and half of Blackberry and PDA owners say they are required to read and respond to work-related emails when they are not at work."⁴⁴ "Fully 48% say they are required to read and respond to email when they are away from work."⁴⁵ Legal issues are created both when an employee presumably volunteers to respond to email and phone messages and when an employer requires non-exempt employees to do so during non-usual hours.

III. Legal Issues

Technology has advanced exponentially in the last few decades, and laws and statutes are struggling to keep pace with technological advancement. More case law is developing in regards to after-hours communication. Litigation on this topic will continue to grow as Generation Z enters the workforce. There are several federal statutes that have implications for after-hours work, even though many of them were created well before the technology that the current employees face. The courts are tasked with applying current circumstances to aging statutes and advancing technology.

Social media is making an ever increasing presence in the workplace. Both employers and employees use social media. As an example, employees look for new positions,⁴⁶ explore the company's website for policies and communicate with friends and co-workers. Employers use it to find employees, check on employees and to reach out for customers.⁴⁷ Because of this increased use, it is imperative that employers develop good social media policies. Legal risk prevention causes employers to be more aware of issues like bullying, harassment, law violations, and negative company images.⁴⁸

Everyone loves a team player; employees who will do anything to get a job done at any time. Yet, "when

non-exempt employees monitor, read and respond to company emails during off hours, and you permit it, those employees are engaged in compensable work."⁴⁹ Organizations are liable for overtime compensation if non-exempt employees perform work after hours even when the supervisor does not request such work.⁵⁰ The Fair Labor Standards Act is clear that non-exempt employees must receive compensation for all work performed, even when the employee is purported to act as a volunteer off the clock.

A. Wage and Hour Compliance--Fair Labor Standards Act

According to the FLSA⁵¹ employees fall into two categories: exempt and non-exempt.⁵² Exempt employees typically do not receive overtime compensation for working over 40 hours a week, while non-exempt employees must be compensated by one and one-half times the hourly rate for every hour "suffered or permitted" in excess of 40 hours per week.⁵³ "Suffered work is when an employee works extra hours to assist co-workers at the consent of the employer, yet they are unrequired or unpaid."⁵⁴ The law requires detailed recordkeeping of hours worked to ensure compliance.⁵⁵ If an employer requires or permits a non-exempt employee to respond to emails, texts, or phone calls, that time must be compensated under the FLSA regulations. Employers must be careful to appropriately label employees as exempt or non-exempt because selective labeling to decrease expenditures violates the FLSA. In addition, the classification of exempt or non-exempt must match the job description regarding the duties performed by the employee to avoid arbitrary labeling or evasion of appropriate compensation.

"Even work that is not requested but is "suffered or permitted" to be performed is work time that must be paid for by the employer. Even if employees volunteer to check in or continue work after the end of their shift, the time spent doing work-related tasks is compensable."⁵⁶ Technology is both a blessing and a curse for employers. Technology has increased productivity on one hand, but it has also decreased privacy. It is very easy to demonstrate after hour technology work due to date and time stamps. Thus, it is rather effortless for employees to demonstrate if such after hour work is substantial or de minimis.

B. De Minimis

Pursuant to the FLSA, work that is not requested but is yet permitted to occur is considered work time.⁵⁷ If the employer is aware of this work, then it is considered work time.⁵⁸ Insignificant periods of work, or "de minimis"⁵⁹

work, are non-compensable. The general consensus is that work that takes 10 minutes or less is considered “de minimis.”⁶⁰ Sending a quick text or responding to an email does not take a significant amount of time is considered de minimis, but this rule does not address whether multiple “de minimis” chores compound to create a significant period of work. If an employee has many messages to respond to after-hours, they could spend a great deal of time tied to their telephones or email accounts (and subsequently, their office). In work related situations where employees communicate after hours, employers must pay fair wages or overtime or face the risk of litigation.

The FLSA does not contain a specific de minimis rule, the Latin phrase for “the law does not take account of trifles,”⁶¹ instead this is a judicial construct.⁶² In *Corbin v. Time Warner Entertainment-Advance/Newhouse Partnership*⁶³ the plaintiff was employed as a non-exempt technical support employee who was hired to answer customer calls.⁶⁴ The employer had an online timekeeping system which was implemented to prevent employees from working off the clock.⁶⁵ This system relied on computer timestamps and rounded an employee’s time for compensation to the nearest hour. The plaintiff unsuccessfully argued that the rounding of hours violated the FLSA. However, Corbin broke even under the rounding system or advanced in compensation in 58% of his hourly shifts.⁶⁶ The United States Court of Appeals in its review referenced the three prong test from *Lindow v. United States*.⁶⁷

When evaluating the de minimis doctrine the court in *Lindow* established the following three prong test: “(1) the practical administrative difficulty of recording the additional time; (2) the aggregate amount of compensable time; and (3) the regularity of additional work.”⁶⁸ Courts interpret the quick and occasional activity as de minimis and non-compensable. However, responding to emails or phone calls on a regular basis for extended periods of time may constitute compensated work time.⁶⁹ Employers must be wary of letting what started as de minimis work roll into work that must be compensated.

C. Discrimination and Harassment in Relaxed Communication Use

Technology provides the illusion of protection and anonymity that face-to-face communication does not. It is easy for formalities to be cast aside in favor of more relaxed forms of communication. Many federal and state laws prohibit discrimination in the workplace.⁷⁰ With the increased use of personal technological devices for work communication, there has been an increase in the “potential for inappropriate communications by employees

through text messages, email, social media or other forms of technology.”⁷¹ This occurred in the case of *Virola v. XO Communications*.⁷² Carla Virola and Lisa Edwards brought suit against their employers for gender discrimination, retaliation, fraudulent inducement of their employment contracts, and emotional distress due to a hostile work environment.⁷³ One aspect of the gender discrimination and hostile work environment claims involved electronic communications. Of all of the allegations, the relevant facts focus on the improper email communications from supervisors and co-workers.⁷⁴ The plaintiffs alleged that a male coworker sent her an email that referenced another female co-worker’s recent breast augmentation; and statements like “you are a female and you are lucky to get what you have gotten thus far” and that she could be replaced for complaining.⁷⁵ A male employee also requested that Virola check his email, where she was exposed to multiple pornographic emails and pictures.⁷⁶ Another male coworker emailed her late at night asking what she was wearing.⁷⁷ As further examples, women were called names in emails and sexual actions were inferred.⁷⁸

This situation obviously contains underlying issues, but the emails provided an additional avenue for harassment toward these female workers. Thus, if employees are working (furthering the employer’s business) employers can face liability during this outside of workplace exchanges. In addition, insurance coverage implications exist depending on whether employees are compensated and deemed “employees” during the alleged off-work time period.

D. Potential Gender Discrimination

Another perhaps overlooked dilemma regarding the requirement for employees to be reachable and available at all times is possible disparate impact⁷⁹ discrimination issues under the Civil Rights Act of 1964.⁸⁰ If an aspect of employees’ perceived worth is their ability to be reached day and night, this could result in a disparate impact on certain groups of people. This is particularly true if an employee suffers adverse employment outcomes as a result of not being as reachable after hours as fellow employees.

Even if the employer has put into place facially neutral compensation structures for work completed outside of working hours, this could disproportionately affect those with family responsibilities. For instance, after hours a female employee with young children may not be able to respond to correspondence as frequently or quickly as someone without children. If this employee is passed over for promotions due to her inability to be reached, she may have a cause for gender discrimination. “Courts have recognized claims where there is an assumption that a woman will perform her job less satisfactorily due to

her presumed family obligations.”⁸¹ There may also be discrimination issues if only one class is expected to work after hours, such as just women employees. If an employer chooses to implement compensation structures for after-hours correspondence, the employer should ensure that it is advantageous to all employees.

IV. Minimization of Employer Risk and Remedies

A. Hourly Employees Must Be Paid for All Work

The court in *Allen v. Chicago* clearly established the compensability of work done on mobile devices outside of work hours. Employers need to have clear policies in place to prevent the miscommunication that occurred in *Allen v. Chicago*. There should be no confusion for employees on what work will be compensated and what steps the employees need to take in order to receive compensation for their work after hours. This means that written employee manuals or policies describing acceptable and non-acceptable forms of work must be distributed to employees and supervisors must be trained to implement such policies. There should also be an avenue for employees to confidentially report abuse or non-compliance with policies. Such a practice helps to remedy problems immediately and avoid legal complications.

B. Respect Personal Time

Employers must have confidence in their employee’s ability to complete their work within designated business hours. John Pencavel’s research indicates that there is little to be gained by working employees harder.⁸² In fact, encouraging employees to complete their work during business hours could result in an increase in productivity.⁸³ In addition, supervision is not present when employees work outside of the designated time and this makes it more challenging for employees to ask questions or to brainstorm solutions with colleagues. Sometimes quick decisions made alone can be costly decisions for the employer. In addition, employees who have personal time to unplug are more likely to be satisfied with the company. Excessive employee turnover is costly regarding employee replacement costs, lost revenue and additional training. Some employees take it upon themselves to bring additional work home, despite corporate policies to the contrary. Continual reinforcement that hourly employees must complete work during regular hours, unless approved otherwise, is important. Millennials and Generation Z

workers don’t think twice to make time to respond to work requests because they are addicted to technology and staying in the loop of work communications and events. Thus, supervisors should monitor, remind, and reinforce corporate work policies.

C. Provide Work-life Boundaries

Work-life balance has a significant impact on employee morale. Allowing employees to have time spent away from the office without work-related communication leads to a happier and more productive workforce. Employees should not fear negative repercussions for being unavailable after hours, absent certain necessary professions such as medical, fire, police, etc. With the trend of millennials favoring work-life balance more than previous generations, it can be expected that promoting flexibility and work-life balance will play an even greater role in recruiting and retaining top talent.

It is beneficial for employers to be proactive and prepared for this trend. One way to prevent some of the legal liabilities associated with after-hours communications by employees regarding work is to ensure that employers create policies about after hours communications and clearly disseminate these policies to all employees.⁸⁴ It should be made clear that all work hours must be accurately reported and the exact procedure to follow should a manager request otherwise.

Responding to the need for greater work-life balance, in 2013 the German labour ministry banned its managers from responding to emails after hours (absent an emergency).⁸⁵ This policy was implemented to prevent job burnout and protect the mental health of employees.⁸⁶ France also recently passed legislation to support work-life balance of employees. Leading the way to disconnect from work emails and other electronic devices France passed a law on January 1, 2017 that allows employees the right to disconnect. This law applies to employers with 50 or more employees. Employees are allowed to ignore work related emails during non-work hours. It was intended to protect the health of employees and ensure that they receive rest from work.⁸⁷

In 2017, Italy also enacted “smart working” legislation to protect self-employed workers and autonomous and flexible work arrangement employees.⁸⁸ Included in this legislation is a provision for the right of employees to disconnect when the workday ends. Employers must provide for balance between an employee’s work and private life.⁸⁹ Also in 2017, the secretary of the Philippines’ Department of Labor and Employment (DOLE) stated “employees who ignore work-related emails or texts after working hours should not be subjected to disciplinary

action.”⁹⁰ These examples clearly show that the world views the new “electronic leash” as a cultural epidemic of technological advancement. Finding a solution to the “always connected culture” will be critical for the health and happiness of employees.

The need to strike a balance between a modern technological world of immediate access and quick replies is being met with international concern because of the need to reduce employee stress, improve employee mental health, and create a better work-life balance. These issues are also being discussed in the United States as represented by a recent proposed right to disconnect law in New York City.

D. Proposed Right to Disconnect Law: New York City

On March 22, 2018, New York City Councilman Rafael Espinal proposed a new law that would allow private sector employees the right to choose not to respond to communication outside of working hours without fear of retaliation.⁹¹ Under this “right to disconnect” law, an employer could not legally require employees to access work email and other electronic communications outside of the office. The proposed law would apply to any employer with 10 or more employees, and extends to sick days, vacation time, and regularly scheduled time off. This law includes a process in which employees could file complaints if the proposed law is being abused. Valid complaints would result in the employer paying both the city and the employee a fine.⁹² If this New York proposed law is enacted, it could lay the groundwork for other cities to implement similar statutes.

The proposed New York City law reads as follows:

§ 20-1402 Disconnecting from work. a. 1. It shall be unlawful for any employer to require an employee to access work-related electronic communications outside of such employee’s usual work hours, not including overtime, except in cases of emergency. 2. All employers shall be required to adopt a written policy regarding the use by employees of electronic devices to send or receive emails, text messages, or any other digital, work-related communication, during non-work hours. Such policy shall include: (i) The usual work hours for each class of employees of the employer; (ii) The categories of paid time off, including, but not limited to, vacation days, personal days and sick days to which employees are entitled. Use of such

paid time off shall be considered non-work hours. The provisions of this chapter do not apply to (i) any employees whose terms of employment require them to be on call twenty-four hours a day on days when they are working, in which case it shall only apply on such employee’s days off, including paid time off, (ii) work study programs under 42 U.S.C. section 2753, (iii) employees for the hours worked and compensated by or through qualified scholarships as defined in 26 U.S.C. section 117 and (iv) independent contractors who do not meet the definition of employee under section 190(2) of the labor law.⁹³

Should this proposed law go into effect there will likely be restructuring of what is considered regular work hours in New York City (staggering the day for employees) so that global communications are not interrupted? Further, it is feasible that employers trying to cut wage costs, typically the highest employer expense, may seek to hire less traditional employees and more independent contractors.

“The bill proposes a number of penalties for employers who fail to comply with its provisions, including: (i) a \$50 fine for each employee who does not receive proper notice of their right to disconnect; (ii) a \$250 fine for each instance of requiring an employee to check electronic communications after work hours; and (iii) fines ranging between \$500 and \$2,500 for retaliating against employees for asserting their rights under the bill.”⁹⁴ Without a doubt, the advancement of technology has obscured the lines between work life and private life. Before the invention of the Internet and smartphones previous generations of non-exempt workers left work tasks at work.⁹⁵ Such legislation that is being proposed in New York and around the world helps to establish concrete boundaries between work expectations and family needs.

E. Proactive Measures to Impede Off the Clock Work

Technology will continue to advance and change the way employees function at work and outside of work. Employers must implement measures to ensure that both management and non-exempt employees conform to the law regarding compensation for work performed. To curb off the clock employee work employers must have a written and detailed employee policy manual that specifies the rules regarding compensable work and defines work that is permitted and work that is prohibited. It should also state when (time of day) work is to be performed and how to submit for appropriate payment. In addition, the policy

must include a penalty for violation of the rules. These work rules must be consistently applied to all non-exempt employees and regularly enforced.⁹⁶

In addition to a well written employee policy manual, employers must also train all employees and supervisors regarding the provisions contained within the manual. It is important that everyone understand the reason these policies are in place and “why” the work on non-exempt employees must stay at work. The helpful and energetic “team players” must be educated that after hours work or volunteer work is not permitted, non-compensated, and non-authorized under the employee policy manual. Employers should also include training and information on the state and federal wage and hour laws for both employees and supervisors.⁹⁷

Another tactic to decrease off the clock liability is to limit employee access to company servers, email accounts, and cell phones. This may seem extreme, but is very beneficial if there is a regular and persistent problem. For example, in 2016 the Volkswagen corporation restricted its servers in Germany for thousands of workers between the end of the work day and the following morning.⁹⁸ Although this does effectively stop the after hour email work issue, it could be problematic for emergency situations. Although access can be granted on a case-by-case basis and email buddies can be assigned to respond to emails during vacations and other non-assigned work time.

When responding to company emails, phone calls, and other work activity is essential to the operation and revenue of an organization the employer should create a compensation reporting system that allows employees to accurately and timely report such expected or necessary off the clock work contributions.⁹⁹ If such work is revenue generating or important to the corporation’s operation then compensating employees will comply with the FLSA and the corporate mission.

Another proactive measure to avoid off the clock litigation is to track the actual work of employees to ensure they comply with the work-time rules. There are many time tracking software programs and all emails and phone calls are time and date stamped.¹⁰⁰ One such tool is Delve Analytics from Office 365, which helps people work smarter and is a “Fitbit for the office.”¹⁰¹ This data analytics program can track time spent writing and answering emails, including after hours work completed.¹⁰² An audit of work productivity will indicate to the employer which employees are working after normal hours, more than de minimis amounts. This data provides information for supervisors to clarify for employees after hours work rules found in the employee policy manual. A corporate

culture from the top down that values employee work productivity during assigned shifts and respects the work-life balance will encourage employees to comply with corporate policies.

V. Conclusion

Technology is evolving faster than our laws, policies and procedures can adapt. Business and personal success has been greatly advanced by this evolutionary technology. No person can retreat back to a life without iPhones, tablets, social media and computers. Everything desired is at our fingertips, literally a click away. This need for instant response compels us as humans to respond when someone sends us an email, text, or social media post. However, both employers and employees must balance the need for immediate response with the expectations of work. In fact, the problem stems from erroneous beliefs by employers and employees that if workers disconnect after hours that the work will suffer. According to a 2017 Gallup poll, “[l]ess than a third of employees who check email outside of normal working hours say their ability to get their jobs done would suffer if they quit doing it.”¹⁰³ This means that two thirds, or the majority, of employees believe that work will not suffer if they disconnect from emails, smartphones, and other technology after normal work hours. However, Gallup research also indicates that employees believe after hour work is positive for employees, likely due to work flexibility, but employees who check email after hours show the most amount of stress.¹⁰⁴ An “always connected culture” does not provide employees time to decompress and rejuvenate for the next work day.

Many countries are currently debating the expectations of work outside of regular hours because of the impact on work-life balance and cultural implications. Recently, a bill was proposed in Quebec to discourage employers from allowing employees to work after hours.¹⁰⁵ The bill introduced at the Quebec national assembly proposed “fines between \$1,000 and \$30,000 for companies that refuse to draft a proper policy.”¹⁰⁶ Although the bill is currently tabled, it demonstrates that the need for employees to disconnect is an international concern.

Regardless of personal opinion, change is happening and laws are being proposed to ensure that employees unplug and balance what is important in life. Employers must meet the standard of the law. Employers must recognize that hourly employees work when connected and compensation must conform to the actual work done and when it is done, not only because it is required by law but because it is the right thing to do.

ENDNOTES

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other employees, opening and closing gates, etc. This pre-shift work ranged from 5-15 minutes per day with typical days being a total of 7-8 minutes per day. The court concluded that the de minimis doctrine applied and that the pre-shift work was non-compensable under the FLSA.

⁶⁸ Supra, note 60.

⁶⁹ Supra, note 41.

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⁷¹ Supra, note 53 at 445.

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⁷³ Id.

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