

## Labor and Employment E-news

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### DOL Rolls-Out Free Smartphone App for Employees to Keep Shadow Time Records: Is this a Concern or an Opportunity for Employers?

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Last week, the DOL unveiled a ["time-keeping smart phone app"](#) for employees to keep their own time records via an application on their iPhones or iPod Touches. The App is free and can be downloaded from iTunes. While the App's concept seems simple and convenient, it may actually cause considerable confusion.

#### THE NEW APP

In its announcement, the DOL says the application is "a timesheet to help employees independently track the hours they work and determine the wages they are owed. Available in English and Spanish, users conveniently can track regular work hours, break time and any overtime hours for one or more employers." "This new technology is significant," the DOL continues, "because instead of relying on their employers' records, workers now can keep their own records. This information could prove invaluable during a Wage and Hour Division investigation when an employer has failed to maintain accurate employment records." But will it?

Under the Fair Labor Standards Act, it is the employer's responsibility to keep daily and weekly records of how many hours non-exempt employees work. These records are the official records, and these records are what drives compensation. Often, through time clocks, time sheets, or computer tracking, the time record is created by the employee. With this new App, employees are being encouraged to create a shadow record. Questions abound. If employees are creating the official record, then how often will the effort to create a shadow record be worthwhile? Also, if the employee's shadow record disagrees with the official record, on what basis can anyone conclude that the shadow record is more accurate?

#### PROBLEMS TO EXPECT THE NEW APP TO CAUSE

Further, there are many nuances in calculating work time and overtime. Will employees know how to round their time, if applicable? Will they know that holidays and other PTO days do not necessarily count as hours worked for overtime purposes? Will they know when to count breaks and when not to count breaks, when to count travel time and when not count travel time, when to count training time and when not to count training time? Will they know how to calculate what's due if they work for different pay rates during the week, earn extra compensation or bonuses, etc.? The answers to all of these questions are likely going to be "no." Their records will be less reliable than the official records in most instances.

The App is not sophisticated. It simply collects time and multiplies it by the employee's wage rate, and then gives a gross pay figure including overtime. The DOL acknowledges that the App's usefulness is limited. It says that it is just starting to explore making updates to address "other pay features not currently provided for, such as tips, commissions, bonuses, deductions, holiday pay, pay for weekends, shift differentials and pay for regular days of rest." In other words, employees using the App will generate a number that may not agree with their employers, perhaps more often than not. Employees will then be asking their employers to explain the difference, all the while with the difference being caused by an App with limited utility. Or worse, they will just go to the DOL and trigger an investigation based on faulty information.

Thus, how will this App "prove invaluable during a Wage and Hour Division investigation when an employer has failed to maintain accurate employment records"? It's hard to see how except in the most extraordinary circumstances. The concept and blunt message from the DOL to employees, though, is clear: "Do not trust your employer!" The DOL believes that most employers try to avoid their legal obligations, and therefore the DOL is trying to get employees to generate evidence to turn in their employers. This is the clear message in the DOL's announcement of this new App, and it's also the message it has expressed when the DOL announced last year its "[Plan/Prevent/Protect](#)" initiative.

## **HOW EMPLOYERS SHOULD RESPOND TO THE DOL'S INITIATIVE**

Accurate timekeeping is a laudable and appropriate goal. While the new App may cause employees more confusion than intended, and unduly question their employer's pay practices, there may still be a silver lining for employers.

What this initiative or App highlights is that employers may be well-served by establishing their own formal internal complaint mechanisms. Under these mechanisms, employees are encouraged to raise any concerns they have about their pay to human resources, and if human resources does not provide them with a satisfactory response, they can appeal that outcome. This is akin to the [safe harbor polices](#) employers should have with respect to deductions made to exempt employees' salaries. If employees fail to take advantage of this mechanism (based on their general views or what their new App tells them), then it may be argued that the employer's records are presumed accurate. This is a developing legal argument, but with the DOL trying to "catch employers" and have employees build evidence against them, now may be the time for employers to seriously consider establishing such polices and complaint mechanisms.

In addition, it would be prudent for employers to audit their timekeeping and payroll practices to make sure that all hours of work, including compensable preparatory and concluding time, are being counted, and that the regular rates of pay are being properly calculated before the overtime pay premium is calculated. As a part of this practice, it would also be prudent to explain both concepts (that is, what time is "work time" how pay is calculated) to both supervisory and non-supervisory employees.

And finally, policies should be in place requiring all employees to provide accurate time records and stress that no management employee may allow an employee to work without accurately reporting that time.

As a final note – for those who don't have iPhones or iTouches, the DOL is also working on developing the App for other platforms, such as Android and BlackBerry.

If you have any questions regarding this E-News Bulletin, please contact your Butzel Long attorney or the author of this E-news Bulletin.

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