



The U.S. DOL Is Raising The Bar For Time & Attendance Software Providers with the Smartphone Timesheet App

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In a previous post, I discussed the U.S. Department of Labor's (DOL) Crackdown on Employers with the announcement of a Notice of Proposed Rulemaking that would require employers to disclose the exemption analysis to every employee that is not subject to overtime. As we noted in that post, this new rule is being touted as the Right To Know rule and is an effort on behalf of DOL to foster openness and transparency to workers about their compensation rights. Now the DOL has gone a step further with its employee rights initiatives and has created an electronic timesheet accessible through a Smartphone application. This new technology empowers employees to maintain their own recordkeeping of regular work hours, break times, and overtime hours, all of which determine the compensation liability of employers. But what does this mean for software providers of time and attendance technology?

Well, for starters, it raises the bar for technology providers to ensure that their systems are designed to comprehensively address wage and hour issues. With employees having access to their own, independent timekeeping capabilities at their fingertips, the burden of proof is heightened for employers to show that they are accurately capturing time as hours worked. One of the hottest issues in Fair Labor Standards Act (FLSA) violations is the way in which employers count time. The new DOL Smartphone application (Smartphone App) will allow employees to challenge the records maintained by employers. If time and attendance systems are not appropriately designed to distinguish between on-the-clock hours and off-the-clock hours, and knowing when to count the time as compensatory time, then employers will be at a clear disadvantage in meeting their burden of proof to show that an employee is not owed wages.

That means, time and attendance providers can no longer simply rely on the employers' existing business rules to design their systems. Rather, time and attendance technology providers will be forced to address FLSA compliance in a proactive manner to ensure that information that goes into the system comes out as an accurately documented record. In other words, the technology provider will be forced to authenticate the employers' business rules. Without this added step of authentication during the design and configuration stage of the software, the technology provider will increase the likelihood of the client blaming the technology for compliance failures. As previously alluded to in the context of counting time as hours worked, the ability of employees to track and maintain their own time records has the potential for major cost implications on employers.



Take for instance an employee that has been misclassified as exempt from overtime. Oftentimes, an employer may not track the hours of exempt employees because doing so gives an appearance that the employee should be paid on an hourly basis. Under the FLSA, tracking hours worked for exempt employees is not required because an exempt employee is paid a predetermined amount on a salary basis regardless of quantity or quality of work. Therefore, if an exempt employee works more than 40 hours in a work week or less than 40 hours, the employee is paid the same amount. For employers that do not track work hours of exempt employees, the new Smartphone App will give a misclassified employee a huge advantage in an FLSA lawsuit. The court will likely rely on the employee's records to determine back wages owed. But the penalties for an FLSA violation go far beyond mere back wages.

The existing penalties for FLSA violations include double back wages, attorney's fees and court costs. Thus, the cost consequences for FLSA compliance failures can be astronomical because double back wages could extend back as far as three (3) years for willful violations. And with misclassifications being a leading cause of FLSA compliance violations, it is imperative that employers maintain accurate and complete records in anticipation of litigation. In light of the Misclassification Initiative announced by DOL in Fiscal Year 2011, employers should be working closely with their time and attendance software providers to ensure that the software systems have appropriate triggers to mitigate misclassification and other FLSA cost consequences.

As noted in the previous March 2011 post, the financial impact on businesses for FLSA compliance failures can be substantial. In the March post, I referenced the \$10 million settlement paid by Pilgrim's Pride after an FLSA lawsuit. I also mentioned the \$900,000 damages award to approximately 16,000 employees at the City of New York. These are just two examples of the increasing FLSA cases against employers in both the private and public sectors. Statistics show that FLSA class actions are outpacing discrimination and ERISA claims. Thus, the urgency of FLSA compliance must be recognized as a serious business matter. The new DOL SmartPhone App compels fine-tuned FLSA recordkeeping practices. Time and attendance software providers can enhance their value proposition by integrating FLSA compliance as part of their system design to thereby, market a solution that comprehensively addresses workforce management issues.