



Overtime Blues

By Tillman Coffey (Atlanta)

Your handbook says, “No unauthorized overtime permitted.” Your managers tell employees that they must get their job duties completed during regular work hours because there is a company-wide prohibition against working overtime. Your managers also tell employees to accurately record their hours worked. All good stuff, right? Could be.

But what if your employees understood (or claim they understood) the message to be: “to keep your job you must get your work done and if you have to work overtime to get it done, so be it. Just know that we don’t want to pay for the overtime so I don’t want you recording those hours. If you do I’ll see you as being an inefficient slacker and I will ‘correct’ the time records to eliminate your overtime hours.” This is *not* the message you intended to communicate.

This situation may seem farfetched because you know that non-exempt employees must record and be paid for all hours worked. You also know that the minimal “savings” your company would achieve by not paying its employees properly is outweighed by the practical risks of losing good employees and the legal risks for violating wage-hour laws – including potential personal liability. And, given that claims under wage and hour laws are one of the fastest growing areas of employment litigation, the risk of a legal challenge to a company’s pay practices is greater now than in recent memory.

The Problem

Many wage-hour lawsuits include allegations that supervisors instructed or “strongly encouraged” non-exempt employees to work off the clock or not to record all hours worked if they did not finish their job during “regular” hours. Some claimants are alleging that their supervisors made off-the-clock work a condition of continued employment. Others have alleged their managers only *implied* that “free” work was expected. Still other claimants allege that their managers made corrections or “overrides” to employees’ time entries to avoid an overtime pay obligation. Whether any of the allegations are true is usually determined in a costly and disruptive lawsuit or government investigation.

Given the economy and other factors, one could envision how an employee could misinterpret the company’s overtime policy and a manager’s instructions to “git’er done” during regular work hours. Many companies see controlling labor costs as a key component to remaining competitive, and in some cases, staying in business. An early and frequent casualty of labor cost-cutting moves is the elimination of authorized overtime and the concomitant premium pay required under federal (and in some cases state) law. In some situations, a manager’s regular compensation or bonus may be based in part on how well he or she controls the compensation costs for the unit for which he or she is responsible. This backdrop may provide the basis for a plausible claim if employers are not diligent.



At the same time, and while working in the same tight economy, many employees are concerned about doing anything that could put their jobs in jeopardy. Failing to meet the employer’s performance expectation is something that could do that. Faced with the “no overtime” edict and demands to complete their work or else, employees who fail to finish the job on time may decide to work “off the clock” to get the work done so they will not be considered slackers.

Employees may decide not to record the hours over 40 and rationalize their actions on the basis that staying “caught up” is to their benefit, even if it means foregoing pay for the work. They may even think that because they are responsible for recording their own time, no one will ever know or care.

Supervisors who are or should be aware of employees working off the clock put the company (and perhaps themselves) in jeopardy under the Fair Labor Standards Act (and many states’ laws). Even if an employee signs a document specifically stating he or she does not want to be paid for the work, you still must record and pay the employee for all hours worked. Likewise, an employer is not immune from a legal challenge based on a failure to pay for all hours worked simply because the employee completed and acknowledged the supposed accuracy of the time records, if those records are not accurate. Under the law, it’s the employer, not the employee, who is responsible for maintaining accurate records.

Help Prevent The Problem

While there is nothing that you can do to prevent employees from fabricating allegations of off-the-clock work, you can take steps to minimize the risks. One step is to make sure the company’s policy on recording all work hours and working overtime is clear and that it accurately and unambiguously communicates the company’s position (*i.e.*, doesn’t lead employees to “read between the lines” something that isn’t

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Problem Employees? Here's A Solution

By John McLachlan (San Francisco)

Issuing employee discipline is one of the hardest aspects of being a supervisor and, since it's so difficult, it's often not done well – when it is done at all. Discipline delayed or mishandled is one of the primary causes of federal and state-agency discrimination charges as well as claims of wrongful discharge, all of which create a distraction from the business and an unplanned expenditure of resources to defend against claims. As long as employees are imperfect, various degrees of discipline will be required in every organization. But correct discipline is neither intuitive nor easy, either for the supervisor or for the employee.

The Traditional Approach

The usual way of disciplining employees is similar to disciplining children, which frequently is not very effective either. Standard disciplinary procedures involve a standard discipline form which points out the problem from management's perspective and a warning that further discipline will follow if performance does not improve. The usual discipline form is relatively easy to fill out because it requires little thought and it allows the supervisor to get through a difficult interview relatively quickly.

But using this check-the-box approach is not the best for an employer who is genuinely interested in improving employee performance. Improved employee performance is, theoretically at least, the objective of disciplinary warning actions. We believe that discipline done right improves the chances that discipline need not be done again, whereas discipline done wrong decreases chances for improved performance, and increases the odds of employee disaffection and possible legal action. While the process set out below requires slightly more thought, we believe it is significantly more effective than the “further-violations-of-this-rule-will-result-in-additional-discipline-up-to-and-including-discharge” approach.

A Method For The Hard Cases

Note that the process described below is not appropriate for every type of employee misbehavior. For example, we do not recommend consideration of this method where the particular offense warrants discharge. If termination is called for, then termination it should be, without further delay or dithering. Nor is this process recommended for a first minor offense, say of the absenteeism program, where it is not at all clear that there is or will be an ongoing performance problem.

The use of this methodology is best suited for the chronic and persistent performance problems, the tough problems that you do not really know how to solve; the problems that are bothering you because you know they are causing the business real difficulties but you don't know exactly how to quantify or deal with them. This methodology is best suited for the situation where you are in doubt whether you should take action now or just put up with the problems until some indefinite day in the distant future when something else may happen.

Successful businesses anticipate and manage problems and successful Human Resources organizations should do the same with people problems.

We're not suggesting that a notice about needed performance improvements should be viewed as a reason for merriment. No amount of alchemy or verbiage will turn a disciplinary warning into a cause for celebration. But after giving some thought about the specifics of the problem, the disciplinary process can be focused on mutually-devised



solutions rather than on unilaterally-imposed punishment. A shift in focus can make all the difference.

Unfortunately, this process cannot be implemented without some prior thought and effort. It will take more than one minute to fill out the form and two minutes to hand it to the offending employee. The method we recommend requires the active participation of the supervisor *and* the employee as integral elements of the process. It is our experience that spending more time to devise an effective solution at the front end is more than compensated by not having to deal with litigation or agency inquiries at the back end of the process.

We advocate an interactive process between the supervisor and the employee to identify and address the problem. If the interactive dialogue does not resolve the problem, discipline flows from the failure of resolution but the discipline is only used after alternative avenues have first been documented and exhausted.

Summarize The Problem – And Your Desire To Resolve It

The first step is to go over the specifics of the performance challenges and to express your belief that the employee can actually correct the problem, while at the same time communicating the fact that failure to resolve it is unacceptable.

In the example below we have assumed that the problem to be addressed involves one employee's consistent failure to work well with other employees. Obviously there are hundreds of possible scenarios but this example provides a fair idea of the use of the methodology.

The first part of the memorandum to the offending employee outlines your concerns about the specific problem:

We have recently discussed your failure to get along with your co-workers. We talked about this problem in the past but we have not seen sustained improvement on your part. We are confident that you have the ability to be successful here, but you need to make a commitment to address the concerns we have raised with you.

I am now requesting your input on this subject. We are giving you the opportunity to show us that you do recognize that

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your past performance has not been satisfactory and that you have a definite plan to change it for the future. We ask you to write three actions you will take, starting tomorrow, to change your past behavior and to address our concerns. If you are unwilling or unable to come up with a plan which will address our concerns and change your behavior, you may want to consider resigning. Frankly, if we do not see immediate and sustained improvement, termination will be the next action we take. [Termination does not necessarily always have to be the next step.]

Please return the completed memo to me by tomorrow morning. I will review it to make sure your plan addresses all of our concerns. Then we will meet again and I will let you know if your commitments are sufficient to successfully resolve the problem.

The next part of the memorandum restates the problem and includes space for employee response.

Our ultimate success as a business depends on the quality of service we provide our customers. If we are not working together as a team, our customer service must and will suffer and the whole business will become less competitive. Your coworkers have complained they believe you are not doing your fair share of the work and they are hesitant to speak to you about it because of your angry responses to any comment they make which you view as criticism. They report that you do not seem to want to be a part of the team. Why do you think they feel this way?

Please list three actions you will commit to undertake to improve your relationship with your coworkers.

1. _____

2. _____

3. _____

Next offer assistance to help the employee implement the commitments for improvement and give the employee the opportunity to bring up any further relevant concerns. Even if there are no responses, you have established that you have offered help to work through the issues and

it will be more difficult for the employee or a plaintiff's lawyer to later claim there was something else in the employment relationship causing the problem.

If there is something that we as a company can do to help you carry out the plans and commitments you have made, please tell us.

If there is anything else relevant to our concerns about your performance, or anything else you want to tell us or have us consider, please note it below.

Then the form is signed by the employee:

I commit to doing each of the actions I have indicated above. I understand that my continued employment depends on my showing immediate and sustained improvement.

Signature

Date

In the best-case scenario, the improvement plan accomplishes its aim and the employee becomes a more effective, cooperative and productive member of the team. That is true success to be celebrated and savored.

And If There Is No Improvement?

What if this interactive process is unsuccessful? What if the employee's relations with fellow employees do not improve and you ultimately terminate him or her? Suppose further the employee refuses to accept any of the blame and decides to find a plaintiff's lawyer to sue you. Imagine the reaction of the plaintiff's lawyer when, during the intake interview with your former employee, the lawyer asks whether your employee has received any discipline before being discharged and is handed this document – filled out in part by his prospective client. At a bare minimum, this would not be an encouraging start to the possible attorney-client relationship.

We believe this is a better way to manage employees with performance issues and improving performance advances an employer's objectives more effectively than does termination. Adopting the methodology outlined above is no guarantee of success, but it improves the chances for a positive outcome where an employer finds deteriorating job performance from an individual who is capable of doing better. At a minimum, the thoughtful use of the methodology incorporated into this form has the potential of discouraging employee challenges to reasonable employer disciplinary decisions.

Try It

As a test, consider the one most significant performance concern on the payroll. You won't have to think more than fifteen seconds before a clear image of this individual will come to mind. This will be someone whose performance is poor, perhaps not completely terrible, but someone who comes to the forefront when you think of problem employees. Give thought to this employee's performance and write down exactly what

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there). Another preventive step is to make sure all supervisors understand that all non-exempt employees are to record and be paid for *all* hours worked, even unauthorized overtime.

Reminding supervisors that the law and company policy require that non-exempt employees who work any overtime (authorized or not) are to be paid properly may discourage a rogue manager from acting improperly. For employees who work unauthorized overtime, you may then treat the employee's unauthorized actions as a disciplinary matter the same as you would any other violation of policy. Prudent employers will document that they have reminded their supervisors of these legal requirements and that the supervisors put their jobs at risk by not adhering to them.

Still another step to lower the risk of a legal challenge is to review records of hours worked to determine if there appears to be an inordinate number of "overrides" or changes to time entries. If there are, determine why. Ideally, the reason for any override would be documented and would show the employee's concurrence in why the change was made. If employees are forgetting to clock in or out, address that issue with employees as a disciplinary matter. If, on the other hand, a supervisor is regularly changing times, get to the bottom of why this is happening.

Finally, be cognizant of dramatic changes in the recorded time it now takes to complete a job. If work that historically took over 40 hours to complete is now taking 40 hours or less, determine why that is happening. Are employees working more efficiently (good) or simply no longer recording their time accurately (very bad)?

The Bottom Line

Keep in mind that employees are becoming more aware of these timekeeping issues and requirements. Last year the U.S. Department of Labor, Wage and Hour Division released a timesheet document and encouraged employees to keep their own, personal time records. Now, the DOL has taken the "personal" timesheet a step further and created an "app" that employees can download and use for recording time, which conveniently includes links to the DOL. Accordingly, the risk of a dispute over work hours and overtime could dramatically increase for an employer failing to capture accurately all hours worked.

If faced with a legal challenge over pay issues, the fact that you did not know you had a problem likely will not insulate your company (and maybe you) from liability. Given the potential negative consequences for non-compliance, taking steps to ensure compliance before you have a problem is worth the time and effort.

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bothers you, using the methodology set out above. After preparing the memorandum, sit with the employee to discuss the problem and ask the employee to propose solutions.

We have seen this methodology work wonders, both in improving employee performance and/or by eliminating the performance issue from the work force, often by self-selection. The first time you try this process, you will have invested fifteen minutes to a half an hour in addressing a genuine concern. We believe the results of this time and effort will be worth the investment and that you will find yourself on the way to a resolution of the problem, hopefully by improved employee performance. No matter how busy or harried, employers always make the time to deal with the crises; we urge you to take the time to eliminate the crises.

If you would like to review a template of additional example scenarios of this form, please email your regular Fisher & Phillips attorney.

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