

Employment Law Commentary

The U.S. Department of Labor's New Timesheet App: The Wage and Hour Stakes Just Got Higher

By **David Zins**

Claims for alleged wage and hour violations continue to present employers with the risk of substantial liability, with back wages paid each year estimated at more than \$180 million for federal claims alone.¹ Aggressive plaintiffs' attorneys adeptly transform their clients' generalized workplace grievances into wage and hour claims, which are comparatively easy to state. Workers classified as exempt from receiving overtime pay allege misclassification and resulting unpaid overtime wages. Other workers claim that they never received pay for some of their hours, resulting in a similar claim for unpaid wages. Moreover, many state wage and hour laws create a maze of requirements to follow regarding the timing of payments, the contents of wage statements, the need for breaks and meals, and other aspects of timekeeping and pay. Statutes of limitations are relatively long, and it is easy to allege a class of similarly situated employees, multiplying an employer's potential exposure. And in the absence of good timekeeping records from the employer, a court may accept an employee's records as presumptively valid.

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The DOL's Timesheet App

Recently the Wage and Hour Division of the U.S. Department of Labor (DOL) handed employees a new tool, making the stakes even higher. Since May of 2011, employees have been able to download the DOL's new app called Timesheet onto their smartphones, which they can use to keep their own separate time records.² The free app is currently compatible with the iPhone, iPod touch, and iPad,³ and the government envisions future versions for the Android, BlackBerry, and other smartphone platforms. In addition, the DOL has a printable calendar application on its website to help employees without smartphones track their time. While Secretary of Labor Hilda Solis claims that they will make it easier for workers to "stand up for their rights,"⁴ it is a certainty that these new technologies will facilitate eager plaintiffs' attorneys in litigating wage and hour disputes against employers.

What the app does. The Timesheet app purports to make it easier for an employee to keep track of the time that she works. She can set up a separate timesheet for each employer, input her hourly wage, and then use the app like a stopwatch to record her time by pressing buttons marked "Start Work," "Start Break," "Stop Break," and "Stop Work." The app allows for manual entry if this functionality is not used in real time. It also allows the employee to categorize breaks as "Meal" or "Other," and to add comments to describe the break in further detail. With a single touch, the employee can view a summary of the hours recorded and wages allegedly due. With another, she can convert this summary into a detailed spreadsheet and email it to herself or her attorney. The app also provides a glossary defining terms such as workweek ("a fixed and regularly recurring period of 168 hours"), and links to information on the DOL's website describing, for example, federal minimum wage and overtime requirements. Finally, the app prominently displays a "Contact Us" tab, which makes a phone call, email, or appointment with the DOL just a touch away.

What the app does not do. As the Timesheet app itself states, it does not track tips, commissions, bonuses, deductions, holiday pay, pay for weekends, shift differentials, or pay for regular days of rest. These limitations may cause confusion as employees attempt to account for these common scenarios, and mistrust may result if an employee erroneously concludes that her employer paid her inaccurately. Nor does the app take into account the concept of de minimis time or an employer's rounding practices. Consequently, the resulting Timesheet record may differ from the employer's records, despite the employer's full compliance with all relevant wage and hour laws. The app similarly does not account for "[t]he existence of certain agreements concerning the payment of overtime," or "greater employee protections" that state law may provide, though the app alerts the user to both of these possibilities.

Such shortcomings could result in a distorted Timesheet record, fostering needless ill-will and creating an official-looking but incorrect starting point in any ensuing dispute.

Why the app matters. The Timesheet app makes it easier for employees to create a record of their hours. These employee-generated records can then be used to challenge the employer's records in a wage and hour dispute. As the DOL states, "[t]his information could prove invaluable during a[n] . . . investigation when an employer has failed to maintain accurate employment records."⁵ If an exempt employee claimed unpaid overtime due to an alleged misclassification, for example, he could use hours logged via the Timesheet app to quantify the amount of overtime due. If the employer did not have records of the actual hours worked, an employee may argue that the DOL, a state agency, or a court should use his personal records as a valid summary of hours worked. The same would be the case with alleged off-the-clock time for which an employee sued his employer to receive compensation. In this way, the Timesheet

app may make it easier for employees to make a case for recovery from their employers in wage and hour disputes.

The Smart Employer's Response

With employees now better equipped than ever to keep track of their own time, an employer should review its timekeeping practices. The best defense against the Timesheet app is to keep better records than employees do.

Keep good records. The wage and hour laws and regulations are quite specific about what information employers must record about their employees and the hours that they work. Now is the time to brush up on these requirements and ensure full compliance. Records need not be preserved in their original form, but they must be accessible, clear, and identifiable. In addition to federal requirements, state law may create more burdensome standards that likewise must be met. California employers, for example, must keep records for at least four years because of Business and Professions Code § 17200, which creates a four-year statute of limitations for state wage claims.

Record and pay time properly. Recording time correctly requires much more than knowing when an employee's scheduled shift begins and ends. For example, an employee may claim unpaid compensation for hours worked voluntarily after the end of a shift, or before it begins. An employer with actual or constructive knowledge of this work may be unable to avoid payment simply through evidence of an unheeded instruction not to work beyond the shift. Additionally, disputes frequently arise over time that an employee is waiting for work, is on call to receive work, is taking a rest break from the job, or is engaged in activities portrayed as preparing for or concluding one's work duties. These boundaries between work and non-work time have never been blurrier, given the rise of telecommuting, web-enabled devices such as smartphones, and a business day extending around the clock.

As a result, an employer must take care to record all the time that an employee is

working, and should remind its employees about good timekeeping practices and the importance of submitting all time worked, both on and off premises. Employers may also want to consider instituting rules mandating approval for all overtime or prohibiting work outside of business hours. Counsel can help determine how to treat any transitional times during which it may be unclear whether to count the time as hours worked.

Here too, state laws impose additional requirements for employers. As one illustrative example, California employees must be provided a thirty-minute meal period for any work period exceeding five hours, unless the shift does not exceed six hours and the employer and employee agree to waive the meal period. A second thirty-minute meal period is due for shifts longer than ten hours, unless the shift is not more than twelve hours, the first meal period was not waived, and the parties mutually agree to waive the second meal period. If an employee does take a meal break, the IWC Orders generally require that the employee clock out and the employer maintain a record of the employee clocking out and back in after the meal period.

Make sure employees are properly classified. Which employees are classified as exempt from receiving overtime pay, and when was the last review of their

job responsibilities to ensure that these classifications are supportable? Given that employees classified as exempt may be tracking their hours on the new Timesheet app as well, now is an ideal time to make sure that their overtime exemptions can withstand legal scrutiny if challenged. A title such as “manager,” “supervisor,” or “administrator” will not be dispositive, nor is it safe to assume that anyone logging in from home or responding to emails on a smartphone will be exempt from receiving overtime pay.

Do not prohibit employees from using the app. One step an employer should not take is discouraging or preventing its employees from using the DOL’s Timesheet app. An employee might argue that the enforcement of such a prohibition is unlawful retaliation.

Conclusion

The DOL has raised the stakes in wage and hour disputes by creating the free Timesheet app, which employees can use to track their own work hours. Armed with information compiled using this app, employees may more easily make a case for back wages due to alleged unpaid time. This development makes it more important than ever for employers to keep accurate and complete time records and to pay their employees properly. It is likewise imperative for employers to ensure the accuracy of their exempt and non-exempt

classifications, in order to prevail in any challenges brought by Timesheet-wielding exempt employees. Now more than ever, good wage and hour practices are the key to avoiding significant liability.

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1. See <http://www.dol.gov/whd/statistics/2008FiscalYear.htm> (last visited July 7, 2011).

2. See http://www.dol.gov/whd/Highlights/archived.htm#May9_2011 (last visited July 7, 2011).

3. The app may be downloaded via the iTunes website. See <http://itunes.apple.com/us/app/dol-timesheet/id433638193?mt=8> (last visited July 7, 2011).

4. Press Release, U.S. Department of Labor Wage and Hour Division, Keeping track of wages: The U.S. Department of Labor has an app for that!

(May 9, 2011), <http://www.dol.gov/opa/media/press/whd/WHD20110686.htm> (last visited July 7, 2011).

5. *Id.*

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