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### Federal Wage Hour Watchdog Weighs in on Employers' AI Use



Employers are increasingly using artificial intelligence (AI)-powered systems to monitor employee activities ranging from schedules and timecards to performance. In previous updates and [podcasts](#), we have closely tracked the federal government's efforts in these areas.

Against this backdrop, the U.S. Department of Labor's (DOL) Wage and Hour Division released a [Field Assistance Bulletin](#) addressing compliance risks posed by the use of AI under the Fair Labor Standards Act (FLSA) and other federal labor standards. This guidance makes it clear that employers remain responsible for compliance with federal laws when adopting AI or other automated systems in the workplace. The bulletin cautions against heavy reliance on AI systems, saying a lack of human eyes could create a domino effect and lead to violations of federal wage and leave laws.

#### **Fair Labor Standards Act**

##### **Hours Worked**

The FLSA generally requires that covered employees be paid at least the federal minimum wage for every hour worked and at least one and one-half times their regular rate of pay for each hour worked in excess of 40 hours in a single workweek. A common issue in wage-hour litigation is whether an employer failed to pay employees for time that should have otherwise been compensated. Central to these cases is whether the employer had knowledge of any uncompensated work performed by the employee. Courts generally hold that compensable work under the FLSA is work that employers require, know about, or should have known about.

To track time worked, employers have traditionally used time clock machines or timesheets. Increasingly, however, employers are using AI software that tracks an employee's "active" and "idle" time for automated timekeeping. Such software not only records when employees sign in and out of work, but it can also monitor each employee's activity to determine whether work is being performed. The DOL's guidance notes that over-

reliance or improper reliance on this type of software may lead to wage-hour liability, saying "[a]n AI program that incorrectly categorizes time as non-compensable work hours based on its analysis of employee activity, productivity, or performance could result in a failure to pay wages for all hours worked. Artificial intelligence or monitoring systems that use keystrokes, eye movements, internet browsing, or other activity to measure productivity are not determinative of whether an employee is performing 'hours worked' under the FLSA."

Accordingly, employers using AI or other automated systems to track employee productivity, activity, and hours worked should not rely solely on these tools to determine hours worked. As explained in the bulletin, the FLSA entitles employees to be paid the federal minimum wage and overtime, when applicable, for all hours worked, "regardless of the level of productivity or performance."

### **Continuous Workday**

Another area where the use of AI could result in unforeseen wage-hour liability risks under the FLSA involves the continuous workday rule. This rule provides that the period between the start and finish time of an employee's principal activity or activities is generally considered compensable. *See* 29 C.F.R. § 790.6. Thus, travel from job site to job site during the workday is also generally compensable. *See id.* § 785.38.

The DOL's guidance cites instances where employers use location-based monitoring systems to track employees. According to the agency, those employers should be cautious as to the extent those systems are being employed to determine whether an employee is actually "working." As explained by the bulletin, using such technology could inadvertently lead to wage-hour liability. For example: "[A]n employee's workday may continue after leaving the worksite if the employer asks them to unload supplies or complete other tasks offsite. A system that records only the time the employee spent at the worksite as compensable work hours when the employee is performing work away from the worksite may fail to account for travel time between worksites or hours worked at other locations and may result in minimum wage or overtime pay violations."

### **Calculating Wages Owed**

Employers who use AI-powered systems to calculate wages should also be vigilant for potential miscalculations that may result in liability. For example, issues sometimes arise when nonexempt employees are paid multiple wage rates (*e.g.*, different hourly rates for different types of work). Under such scenarios, the employee's regular rate of pay for that week is typically the "weighted average" of such rates. *See* 29 C.F.R. § 778.115. The DOL stated that AI-driven systems may "automatically recalculate and adjust a worker's pay rate throughout the day . . . , which may result in significant different regular rates from one workweek to the next. Similarly, some automated task assignment systems have the ability to determine the number of types of tasks assigned to individual workers, based on a variety of factors and metrics." The DOL instructs that employers who use such technologies should exercise proper human oversight to ensure that employees are paid applicable minimum wages and are accurately paid their regular rate and overtime premium.

### **Family and Medical Leave Act**

The Family and Medical Leave Act (FMLA) provides eligible employees of covered employers with job-protected leave for qualifying family and medical reasons and requires continuation of their group health benefits under the same conditions as if they had not taken leave. According to the DOL's guidance, employers may run afoul of the FMLA if AI or automated systems incorrectly deny employees leave, miscalculate time off earned, or request too much information from employees (*e.g.*, improperly request certification from a health care provider supporting the need for FMLA leave). The use of AI or automated technologies should be overseen by the employer to avoid risks of violations of FMLA rights.

## **The PUMP Act**

Under the FLSA, as amended by the Providing Urgent Maternal Protections for Nursing Mothers Act (PUMP Act), most nursing employees have the right to reasonable break time and space to express breast milk while at work. The PUMP Act generally does not require that employees be compensated for break time needed to pump breast milk unless otherwise required by federal or state law or municipal ordinance. 29 U.S.C. § 218d.

Accordingly, employers are responsible for ensuring nursing employees are not penalized by AI or automated systems that track hours and productivity. "Automated scheduling or timekeeping systems that limit the length, frequency, or timing of a nursing employee's breaks to pump would violate the FLSA's reasonable break time requirement," the memo said. "An automated scheduling system that requires an employee to work additional hours to make up for the time they spent taking pump breaks or reduces the number of hours an employee is scheduled in the future because they took pump breaks would also be unlawful retaliation under the FLSA."

## **Takeaways**

The DOL's guidance represents the latest attempt by the government to provide employers with some guardrails in the use of emerging technologies. Some of the technologies have been in the workplace for some time, but the rapid deployment of predictive AI systems raises the risk of unwittingly violating various employment laws. At bottom, the DOL's guidance follows the standard rules of thumb that employers should (1) ensure that systems pass legal muster before being employed and (2) implement policies that encourage human oversight and intervention. Employers with questions about the use of AI and wage-hour compliance should contact experienced counsel.

To stay up to date on guidance regarding wage-hour compliance, please visit our [Wage & Hour Developments blog](#).

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