



E-Mail Curfew May Help Newly Nonexempt Employees Adjust

By Allen Smith 7/20/2015

There will be a period of adjustment for employees if they are reclassified as nonexempt due to the Department of Labor's (DOL's) proposed overtime rule, should it be finalized in its present form. In addition to establishing overtime policies, e-mail curfews can help newly nonexempt employees understand the types of work that now are off-limits, even though they were permitted in the past.

Overtime Policies

Some employers may not decide to adopt e-mail curfews, but instead opt to shore up their overtime policies.

Dena Sokolow, an attorney with Baker Donelson in Tallahassee, Fla., said that overtime policies need to address such off-duty tasks as:

- Taking work home.
- Making/receiving job-related phone calls at home.
- Working through lunch.
- Working before or after regular shifts.
- Taking care of employer equipment.
- Job-related "volunteer" work.

"Most exempt employees do not track their working hours and may regularly perform 'off-duty' work, without any thought of the time spent on those work-related tasks," she noted. "Once these exempt employees become nonexempt, however, that off-duty communication can become compensable overtime."

E-Mail Curfew Exceptions

Even if adopting an e-mail curfew, employers should be careful before adopting a curfew across the board, Sokolow cautioned. "There may be a class of employees where it is to the employer's benefit not to restrict after-hour e-mails. Be careful of applying a blanket curfew without first analyzing the effects on your production," she said.

E-mail curfews aren't yet widespread, noted Paul DeCamp, an attorney with Jackson Lewis in Reston, Va., and former administrator of the DOL's Wage and Hour Division. But they may become more common as a way to limit overtime costs. He recommended allowing exceptions to e-mail curfew policies for employees acting at the direction of a supervisor or manager, and in emergency situations.

Supervisors should limit their after-hours communications with nonexempt employees to make e-mail curfews work their best and maximize the savings in overtime. A supervisor who is contacting nonexempt employees repeatedly by e-mail can make the policy seem paper-thin.

"Employers should alert the exempt superiors of nonexempt employees with electronic or mobile devices to limit their after-work hours communications with these employees to emergency situations only," observed Alfred Robinson Jr., an attorney with Ogletree Deakins in Washington, D.C., and former acting administrator of the Wage and Hour Division. Allowable exceptions to the e-mail curfew should be written into the policies and only include true emergencies, not trumped-up emergencies.

"Reducing the after-work hours contact by exempt employees with nonexempt employees will minimize the chances that a nonexempt employee will violate the policy," he remarked.

If there is no policy exception for supervisors contacting employees, the e-mail curfew needs to be more strictly enforced. But then it may put employees in the difficult situation of receiving e-mails from supervisors but, according to the policy, not being able to respond unless there is an emergency. "Absent clear training regarding how to react to that kind of situation, most employees would not be particularly well-equipped to know what to do," DeCamp remarked.

"Punishing an employee in that situation might be unfair and counterproductive," he added. "Where, however, the employee has received clear guidance—not just a sentence buried in page 309 of the employee handbook, but information the employee realistically has seen regarding how to deal with that type of situation, and the employee elects to follow the manager's instruction contrary to policy, then disciplining the employee and the manager is necessary."

Training should be for managers and not just employees, Robinson added.

Not a 'Wink-Wink' Practice

If an e-mail curfew is adopted, make sure employees know the employer means business.

"It is imperative that e-mail curfews are not just a 'wink-wink' practice where the intent is stated simply in a written document without any implementation or enforcement. Because manager/employee e-mail use has become a matter of culture as much as it is an easy mode of communication, employers should consider creating and rolling out an effective e-mail usage policy separate in time and announcement from other HR-related policies," said Michael Schmidt, an

attorney with Cozen O'Connor in New York City.

DeCamp agreed, saying that to ensure compliance with an e-mail curfew, “Managers need to understand clearly that the policy is real and is to be taken seriously. They need to understand that if they want nonexempt employees to be engaging in anything work-related after hours, then that is not free labor, but instead something that the manager will need to pay for with scarce labor dollars.”

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