

# An Overview of the Potential Impact of Emerging Technology on the Fair Labor Standards Act

Presented by Steven Gutierrez, Esq.  
Holland & Hart, LLP

# Presenters

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- Steven M. Gutierrez
- Mr. Gutierrez is the chair of Holland & Hart's Labor and Employment practice group.
- He has extensive litigation experience and has handled claims concerning wrongful termination, breach of express or implied employment contracts, violation of covenants not to compete, contracts for the protection of trade secrets, employment discrimination, wage matters (including FLSA collective actions), FMLA claims, defamation, torts and claims of retaliatory discharge.
- He speaks frequently at national programs on topics that address the employment relationship. He has provided training to professionals on a wide range of employment-related topics, including workplace investigations techniques and practice and workplace violence prevention.

# Presentation Overview

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- Introduction
- FLSA: Just The Basics
- FLSA Overtime Rules and Regulations
- Growing Trend of FLSA Violations
- Potential Impact of FLSA Violations
- DOL Enforcement: It Can Happen to You!
- The Rise of FLSA Collective Actions
- PDA's, I-phones, and the Future of the FLSA
- Recommendations & Strategies

# Framing the Issue

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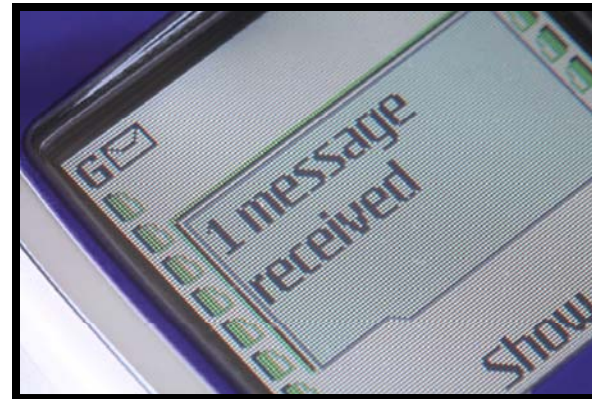
“Modern technology has made it easy and convenient for workers to telecommute, fielding work-related phone calls and e-mails when away from their offices. But that convenience has a catch: When is time “off” really off?”

-Commentator Carmel Sileo

# Did you Know?

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- "More than 740 billion text messages carried on carriers' networks during the first half of 2009. That's an average of 4.1 Billion text messages sent/received each day."
- "According to a new study by a U.K.-based employment law firm Peninsula, roughly 130 British pounds (or about \$264 million U.S.) is lost per day by British corporations due to office workers dillydallying on Facebook."



# Blackberry's, I-phones, and much more...



# The Fair Labor Standards Act

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- First approved in 1938, codified as 29 U.S.C. § 201
- Impacts an estimated 130 million workers
- Enforced by the U.S. Dep't of Labor-Wage & Hour Division
- Most well-known provision of 29 U.S.C. § 201.....

# The Fair Labor Standards Act

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## Overtime Compensation:

All Non-Exempt Employees MUST be paid overtime pay at time and one-half the regular rate of pay for all hours worked over 40 hours in a week.



# Who's Subject to the FLSA Overtime Provisions?

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- FLSA creates several categories of employees
- Only non-exempt employees are “covered” under the FLSA overtime provision
- Exemptions are based on employee duties and salary

# Who's Subject to the FLSA Overtime Provisions?

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## “White-Collar” Exemptions

- Executive Employees
- Administrative Employees
- Professional Employees
- Computer Employee Exemption
- Outside Sales Employees



# Administrative Employee Exemption

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- Must be paid a salary of at least \$455 per week.
- Primary duty of office work that is directly related to “the management or general business operations of the employer.”
- Primary duty must include “the exercise of discretion and independent judgment with respect to matters of significance.”

# Executive Employee Exemption

- Must be paid a salary of at least \$455 per week.
- “Customarily and regularly direct the work of at least two or more” full time employees.
- Some level of authority concerning employee personnel decisions.
- Primary duty of “managing the enterprise, or managing a customarily recognized department” of the enterprise.



# But Remember.....

In 2007, about 115 million employees, 86% of the American workforce, was covered by the FLSA overtime provisions, meaning....



FLSA overtime provisions may apply to  
YOUR employees!

# What does “overtime” really mean?

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- FLSA “defines the term “employ” to include the words “suffer or permit to work.””
- So...“time spent doing work not requested by the employer, but still allowed, is generally hours worked.”
- Employees who are classified as non-exempt must be paid one and a half times their hourly wages, in some cases, even when an employer did not authorize the overtime.

# FLSA Violations: On the Rise?

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Since 2000, DOL Wage and Hour Division has collected over \$1.4 billion in back wages!



# FLSA Violations: On the Rise?

- 2008 FLSA violations...
  - \$185 million in back wages for over 228,000 employees
  - \$9.9 million in civil money penalties.
  - 10,105 overtime violations involving 182,964 employees
  - \$123,686,617 in back wages.





# What about the Hospitality Industry?

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- 875 violations committed by hotels and motels
- Payment of \$2,445,094 in back wages
- 5,034 employees nationwide



## Other Potential Consequences...

Resolution of an FLSA overtime claim can include:

- civil penalties and fines
- potential criminal prosecution
- countless hearings
- attorneys' fees
- back pay and liquidated damages
- negative publicity



And...

**MULTI-MILLION DOLLAR SETTLEMENTS!**

## ~~Cintas Corp. \$23 million settlement~~

In August 2009, Cintas Corp. settled for an estimated \$23 million to resolve a “class-action complaint in federal court that alleged the company illegally withheld overtime pay to drivers on its delivery routes.”

## ~~Cintas Corp. \$23 million settlement~~

- Delivery drivers claimed that “Cintas misclassified route drivers as exempt employees under wage and hour laws in order to avoid having to pay them overtime.”
- After insurance proceeds and taxes, which reduced the impact of the settlement on Cintas’ bottom line, “at \$12 million, the after-tax charge from the settlement would have reduced Cintas’ fiscal 2009 (ended in May) net profits of \$226 million by about 5 percent.”

# Lowe's Inc. \$29.5 million settlement

- After seven years of litigation, Lowe' Companies Inc. settled an overtime compensation dispute for \$29.5 million in September of 2009.
- Crux of the lawsuit was allegation that two employees and “thousands of other hourly Lowe’s workers were required to work before and after their normal shifts but were not paid for the extra work.”
- “Not only did the Court of Appeals reverse the decision by the trial court but, in an unusual move, rather than ordering the lower court to reconsider the issue, actually ordered that the case be granted class certification status.”

# Increased Enforcement by DOL

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- U.S. Government Accountability Office (“GAO”) recently released a wide-ranging investigative report that criticized the Department for inadequate enforcement of the FLSA overtime provisions.

“The Wage and Hour Division has simply dropped the ball in pursuing employers that cheat its workers out of their hard earned wages.”

-U.S. Congressman George Miller

# Increased Enforcement by DOL

- DOL Secretary Solis has declared that 150 new investigators will be added to the Department's field offices.
- American Recovery and Reinvestment Act of 2009 authorizes the increase of 100 investigators as well.
- Both staffing increases, coupled with increased scrutiny from Congress, suggest Federal Government will vigorously enforce FLSA overtime provisions in the future.



# The Rise of Collective Actions

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- Under 29 U.S.C. 216(b), FLSA “permits the aggregation of hundreds or thousands of claims requiring only that the employees be ‘similarly situated.’”
- Collective Action claims differ from Class Actions
  - “Less stringent” than the standard employed under F.R.C.P. 23.
  - Courts typically employ “two-tiered review” when adjudicating potential FLSA collective actions.
  - Initial review, “known as the notice-stage determination. . . typically results in “conditional certification” of a representative class.
  - “Near automatic double-damages” & Attorneys’ Fees!



# The Rise of Collective Actions

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f the liberal standard for authorizing  
: remedial purpose of the FLSA, courts  
· notice based only on the allegations  
int and affidavits furnished from class

gen, member of the ABA  
nployment Section's Equal Employment Opportunity Committee

## *Roebuck v. Hudson Valley Farms, Inc.*

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- U.S. District Court for the Northern District of New York holds that three affidavits, submitted by employees in FLSA dispute, were “sufficient to constitute a preliminary showing” of a potential FLSA violation.
- Under 29 U.S.C. 216(b), “plaintiffs need only make a modest factual showing” to proceed with notice to the potential class of litigants.

# Emerging Risks Posed by New Technology

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- Is an employee who checks his blackberry at home entitled to overtime compensation?
- Should he be compensated for the time he spends updating his professional bio on “Facebook” or “LinkedIn”?
- Or for the written updates he provides concerning his company’s services on his personal “Twitter” page?

The Facebook logo, consisting of the word "facebook" in white lowercase letters on a blue rectangular background.The Twitter logo, featuring the word "twitter" in a light blue, rounded, lowercase font with a white outline.The LinkedIn logo, with the word "Linked" in black and "in" in white lowercase letters inside a blue square, followed by a registered trademark symbol.

Does an employee’s use of a cell phone or blackberry after-hours constitute ‘hours worked’ under the FLSA?

# A Perfect Example....

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<http://www.youtube.com/watch?v=OHB5YDxUfJM&feature=related>

# Emerging Risks Posed by New Technology

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Does an employee's use of a cell phone or blackberry after-hours constitute 'hours worked' under the FLSA?

“Two recent lawsuits highlight the problems of this blurred boundary.”

*Agui v. T-Mobile Inc.*



*Rulli v. CB Richard Ellis*

## *Agui v. T-Mobile Inc.*

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- Three plaintiffs each employed as non-exempt sales representatives at T-Mobile
- Each provided with a “company blackberry or other smart device.”
- Plaintiffs allege they were “required to review and respond to T-Mobile related emails and text messages at all hours of the day, whether or not they were punched into T-Mobile’s computer based timecard system.”
- As non-exempt employees, plaintiffs argue they were entitled to overtime wages for the ten to fifteen hours they spent every week “reviewing and responding to emails, texts, phone calls” and more.

# *Agui v. T-Mobile Inc.*

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- Allegedly, “when they complained, the suit alleges, managers told them this was one of T-Mobile’s standard business practices.”
- Plaintiffs demanding back wages, liquidated damages, additional liquidated damages for unreasonably delayed payment of wages and attorneys’ fees.
- Potential Collective Action....and T-Mobile employs 36,000 nationwide!

 T-Mobile®

# *Rulli v. CB Richard Ellis*

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- John Rulli filed a collective action claim (per 29 U.S.C. 216(b)) against CB Richard Ellis for unpaid overtime compensation.
- Rulli alleges he and other employees were “given personal data assistants, such as Blackberries, smart phones, cell phones, pagers or other communication devices.”
- Claims that all employees were required to use such devices “outside their normal working hours without receiving any compensation.”
- Rulli argues that CB Richard Ellis required him and others to respond to incoming messages on these devices within “fifteen minutes” of receiving them.



## *Rulli v. CB Richard Ellis*

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“These workers were getting text messages from their supervisors while they were at home having dinner or out watching a movie. And they had to respond, even though they were off the clock and not being paid for it. It was really intrusive.”

-Nola Hitchcock, Rulli's Attorney

## *Rulli v. CB Richard Ellis*

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- Damages sought are similar to those requested by the T-Mobile employees in *Agui*: unpaid back wages and liquidated damages under 29 U.S.C. 216(b).
- “Potential clients could number in the thousands.”
- “*Rulli* is the first case that focuses on this technology.”

## *West v. Verizon Communications Inc.*

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- In *West*, Verizon Personal Account Managers (“PAM’s”) alleged they were not “compensated at time and one-half for overtime hours in violation of the FLSA.”
- Magistrate did not dispute that Verizon provided PAM’s with “a Blackberry with a cell phone” and that “because PAM’s can take their Blackberry outside the home and work from a remote location, PAM’s have the ability to do their jobs anywhere.” As a result, “many PAM’s opt to work from home.”

## *West v. Verizon Communications Inc.*

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However...this also allowed “PAM’s periods of time during the day to engage in other, often significant, non-PAM-related activities such as working around the home” and “shopping.”

**Because they “had such opportunities to engage in non-work related activities during “on-call” time,” they were not “similarly situated” under 29 U.S.C. 216(b).**

## *West v. Verizon Communications Inc.*

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- U.S. District Court for Middle District of Florida agrees! Upholds magistrate's denial of class certification.
- Court finds no error with magistrate's rejection of the "two-tiered analysis," observing that "the two-tiered analysis is not mandatory."

## *West v. Verizon Communications Inc.*

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- Court goes even further, declares that while “class certification issues should be determined separately from the merits of the case,” the issues surrounding certification “cannot be decided in a vacuum.”
- Court rejects Plaintiff’s contention that magistrate inappropriately considered the merits of the case at the certification stage.

## *Agui & Rulli: What's at Stake?*

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Although the court's denial of class certification in *West* is informative, it is not dispositive, as “whether time spent on call is compensable is a question of fact decided in the context of each case.”

Simply put...

No two overtime cases are alike under the FLSA.

# *Agui & Rulli: What's at Stake?*

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Neither *Agui* nor *Rulli* involve “on-call” time per se.

“CBRE's actions are different from the practice of designating certain employees “on call,” in which employees are paid if they're called into a work site.””

-Nola Hitchcock, Rulli's Attorney



# *Agui & Rulli*: What's at Stake?

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Central issue in *Agui* and *Rulli* is not the parameters of “on-call” time, but whether non-exempt employees are entitled to overtime pay when performing work on electronic devices outside of the office.



# *Agui & Rulli: What's at Stake?*

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- Under the statutory text of the FLSA, employees may be entitled to overtime pay for work done on mobile devices.
- DOL considers “hours worked” outside of work-week as overtime when the employee is made to “suffer” or “permitted” to work.
- As a practical matter, overtime is mandated when the “employer knows or has reason to believe that the employees are continuing to work and the employer is benefiting from the work being done.”
- In *Agui* and *Rulli*, the provision of PDA’s to employees could suggest that each employer knew these individuals might engage in work-related activities beyond the office.

# Agui & Rulli: What's at Stake?

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As noted by *The Wall Street Journal*, “court decisions have interpreted the law to require some hourly employees to be paid for putting on and taking off work uniforms.”



Other courts have ordered that employees be compensated “for the time spent while booting up computers.”

Whether these decisions will prove persuasive to the courts in *Agui* and *Rulli*, however, remains to be seen...

# Where Do We Go From Here?

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“Management-side attorneys **fear a new wave of wage and hour litigation is just around the corner**, in which employees will claim overtime for all the hours they’ve spent clicking away on their Blackberries or other digital communication devices.”

-The National Law Journal

There are a number of strategies that can help employers avoid potential liability under the FLSA....

# Draft and Enforce Comprehensive Human Resource Policies

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- Exempt employees are not entitled to overtime compensation.
- If an employee is misclassified as exempt, however, an employer could owe thousands of dollars in unpaid overtime compensation.
- Employers must carefully draft their policies concerning exempt and non-exempt employees, to ensure that their workforces are properly classified under federal statute.

# Discourage Overtime Work for Non-Exempt Employees

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- Non-exempt employees are entitled to overtime compensation for hours worked regardless of whether such work was authorized by their employer.
- Employers should advise against overtime that has not been authorized by an employee's proper supervisor.
- Policies that encourage (and indeed require) prompt notification from employees of hours worked will ensure an expedited resolution to potential FLSA violations.

# Provide PDA's Sparingly to Non-Exempt Employees

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By providing an employee with a communication device, e.g., a PDA, and acknowledging that the employee will use the device outside of normal business hours, the employer may be liable for overtime pay.



# Provide PDA's Sparingly to Non-Exempt Employees

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- While an employer might not expressly authorize the employee to respond to emails late in the evening, the employee's possession of the device raises several legal issues.
- Employers should restrict company owned PDA's to exempt employees whenever possible. Further, those non-exempt employees who must be provided PDA's should be advised that they should use the instruments only with prior authorization.



# Conduct Regular Audits

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- Performing regular audits of employee classifications and hours worked by all employees is a prudent step employers can take to protect their businesses from prospective FLSA.
- Audits can produce better “risk management” and internal payroll and timekeeping controls for all employees, which can further reduce the risk of overtime provisions. e FLSA’s



# Conduct Regular Audits

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- An audit can also be useful in developing “proper decision-making protocols for dealing with particular e
- All in all, an audit of your human resources can prove immensely helpful, as it will ensure compliance with the FLSA and a host of other employment statutes.



# Conclusion

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- Some believe that it is “only a matter of time” before a “wave” of litigation in this area ensues.
- Though this wave may impact all employers, those who take the right steps may be able to dodge the biggest ones.

# Conclusion

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- By performing an audit of your internal human resource policies, your organization can engage in useful risk assessment and revise the areas that require clarification.
- While there is no perfect solution, taking these steps will go a long way in preparing your organization for potential FLSA claims that involve Blackberry's, I-phones, and future technologies that will surely emerge in the future.

# Questions?

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