

## THOUGHT LEADERSHIP

LEGAL UPDATES

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# Keeping the "H" in "HR" – a Primer on the DOL's AI Guidance

Recently, the Wage and Hour Division (WHD) of the Department of Labor issued a Field Assistance Bulletin (FAB) that provides guidance for employers on the application of artificial intelligence (AI) to the Fair Labor Standards Act (FLSA), the Family and Medical Leave Act (FMLA), and other federal labor standards.

In the FAB, the DOL emphasizes the importance of keeping the “human” in “human resources” when using AI tools in the workplace. HR professionals are more valuable now than ever and will continue to be a critical aspect of business operations to help ensure proper use of new technologies to avoid unintended consequences and maintain compliance with federal labor laws.

### Tracking hours worked

AI tools can be used to measure and analyze employee productivity or activity such as computer keystrokes or mouse clicks, website browsing, presence and activity in front of a web camera, and other data to determine when an employee is “active” or “idle.” The DOL warns that reliance on such AI tools without appropriate oversight can create potential compliance issues as AI tools may incorrectly categorize time as non-compensable. Such metrics of productivity are not determinative of whether an employee is performing “hours worked” under the FLSA that must be compensated. For example:

**Timekeeping systems:** Timekeeping systems that incorporate AI to make predictions and auto-populate time entries based on prior time entries, scheduled shift times, and break times, do not relieve employers of the obligation to ensure that records are accurate and that employees are paid for short breaks of 20 minutes or less. Employers have the responsibility to ensure

that time records accurately reflect breaks taken and that employees are compensated for all hours worked under the FLSA.

**Automated scheduling and task assignment:** When AI is used for automated scheduling and task assignment programs, there is the potential issue of hours worked not including the time when an employee is “engaged to wait.” The FLSA considers waiting time where an employee is not provided with sufficient time that they can use the time for their own purposes, or is not completely relieved from their duties, as compensable. Employers must thus ensure that they are accurately accounting for increments of time where an employee is waiting for their next assigned tasks regardless of technologies used to assign tasks or set schedules.

**Location-based monitoring:** If employers use location-based monitoring to track employees, which determine whether an employee is “working” based on the location of the employee, such tracking may also create FLSA compliance problems. The FAB provides an example of a construction worker that begins their workday before they arrive at the designated worksite because their employer asks them to pick up tools at the company headquarters or purchase supplies at the store on their way to the worksite. A system that records only the time the employee spends on the worksite as compensable work hours 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 under the FLSA**

Employers that use AI or other technologies to calculate wage rates must ensure that employees are paid in accordance with federal minimum wage, overtime, and other wage requirements.

AI systems may use automated algorithms to independently calculate and determine workers’ rates of pay based on a variety of data and metrics collected by the systems – including fluctuating supply and demand, customer traffic, geographic location, worker efficiency or performance, or the type of task performed by the employee. Where an employee is paid multiple different wage rates (including hourly and/or piece rates) for work performed in a single workweek, the employee’s “regular rate” (which must be used to calculate overtime properly) must be calculated properly.

Again, the DOL reiterates that employers must exercise proper human oversight to ensure the AI technology that is used calculates an employee’s regular rate of pay and overtime accurately and that employee pay and pay rates are accurate.

### **Processing FMLA leave requests and certifications**

With respect to FMLA compliance, the DOL again warns that relying on automated systems without proper oversight can get an employer into hot water. For example:

**Eligibility:** As noted above, timekeeping programs may incorrectly determine the hours an employee has worked, which may result in a failure to correctly determine an employee's FMLA eligibility.

**Certification:** The use of AI by an employer to administer FMLA leave can also create potential risks of violating the FMLA's certification requirements for determining whether leave is FMLA-qualifying. An example provided by the guidance is a system that triggers penalties when an employee misses a certification deadline, which could violate the FMLA if the deadline should not have been imposed or the system failed to appropriately take into account circumstances that permit extra time for submission.

### **Other federal laws addressed**

In addition to the above identified issues with AI and the FLSA and FMLA, the DOL addresses concerns when using AI in various additional areas governed by federal law, including:

**PUMP Act:** Automated scheduling or timekeeping systems that limit the length, frequency, or timing of a nursing employee's breaks to pump can violate the FLSA's reasonable break time requirement. In addition, productivity scoring or other metrics that penalize a worker for failing to meet productivity standards or quotas due to pump breaks also violates the FLSA.

**Employee Polygraph Protection Act:** AI technologies have the ability to use eye measurements, voice analysis, micro-expressions, or other body movements to suggest if someone is lying or detect deception. The DOL cautions that such use of AI technology may violate the EPPA.

**Anti-retaliation laws:** The DOL also warns against use of AI in a way that could violate anti-retaliation protections under the FLSA and various other laws, such as through surveillance of the workforce for protected activities like filing complaints with governmental agencies.

### **What does this mean for employers?**

Human resource professionals are needed more now than ever.

Without proper human supervision, AI technologies can pose potential risks to employees with respect to labor standards and may result in violations by employers of the laws enforced by WHD.

Employers are responsible when their use of AI technologies results in a violation of a law and must ensure the use of AI complies with the FLSA, FMLA, and other laws that the WHD enforces.

**Contact us**

If you have questions about the FAB or the use of AI in the workplace, please contact Laura Malugade, Shawna Ruetz, or your Husch Blackwell attorney.