

Timekeeping and Wage Theft in the 21st Century

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Elizabeth Tippet, Charlotte S. Alexander & Zev J. Eigen, [When Timekeeping Software Undermines Compliance](#), 19 **Yale J.L. & Tech.** 1 (2017).

Nearly sixty percent of American workers are paid on an hourly basis. Despite this reality, wage and hour law typically generates little attention in academic literature. While there has been considerable discussion about “the gig economy” and independent contractors, the nuts and bolts concerning how most Americans get paid goes largely unaddressed in legal scholarship. For this reason alone, a new article by Elizabeth Tippet (Oregon), Charlotte S. Alexander (Georgia State), and Zev J. Eigen (Littler Mendelson) represents a welcome addition to the literature.

The article focuses on workplace timekeeping software and the ways in which employers can use such software to commit wage theft. The authors review the functionality of thirteen different timekeeping software programs and explore how such software can be used by supervisors to effectively cheat employees out of wages for hours worked. Without going into great detail here, these programs vary considerably in their structure. Several of the programs allow – and in some cases, tacitly encourage – supervisors to review an employee’s submissions and then edit those submissions without providing any sort of notification to employees. The authors postulate that these types of programs pose the greatest risk of wage theft. Programs that afford supervisors less discretion present less risk.

Although the authors do not make any sort of empirical claims as to how common employer wage theft is, they do apply behavioral ethics theory to this situation to suggest, at least, that it would be unsurprising if supervisors engaged in unlawful edits to employees’ time and attendance data. For example, the authors discuss how behavioral ethics suggests that people are more likely to cheat when they can distance themselves from the dishonest transaction (such as where a supervisor can adjust an employee’s overtime hours online rather than directly ordering the employee to work off the clock). The authors speculate that, in light of all of this, employers might be underestimating the litigation risks associated with certain timekeeping systems.

These are all interesting observations, but part of what makes them noteworthy is the fact that this type of analysis is so uncommon in legal scholarship involving the law of the workplace. Questions about hours worked and overtime pay are of central importance to most employees. Yet, legal academics rarely discuss the nitty-gritty of how these things are measured in the workplace and how timekeeping systems might be abused.

The other feature of the article that makes it especially noteworthy is the fact that it serves as a reminder of an obvious, yet valuable, point. The Fair Labor Standards Act (FLSA), the primary federal wage and hour law, is an old statute. Like really old. And its main provisions have largely remained the same over time. Thus, as the authors note, it’s important to reflect on the fact that “the main law regulating work hours and pay for most employees in the United States has remained unchanged since before the Second World War.” (P. 9.) Even though the Department of Labor recently updated regulations regarding the overtime exemptions, the associated recordkeeping regulations have not been updated since 1987 and somewhat comically still contain references to “microfilm.” (P. 46.)

The authors ultimately offer a sensible update to the regulations in this area based on Department of Defense contractor guidelines. These guidelines, among other things, impose greater limitations on the ability of employers to modify timesheets without the knowledge of employees. But as part of their attempt to address the specific concerns associated with the regulation of timekeeping software, the authors make an important point regarding the need for workplace regulations to stay current with technological changes. As employers increasingly turn to technological

advances to monitor their employees, the Department of Labor also needs to adjust. Nowhere does that fact seem more important than in the wage and hour context.

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