

WAGE AGAINST THE MACHINE: ARTIFICIAL INTELLIGENCE AND THE FAIR LABOR STANDARDS ACT

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Artificial intelligence (AI) is being used in the workplace for a wide range of wage and hour purposes, including AI-driven payroll, scheduling and staffing, timekeeping, and monitoring employees. If appropriately designed and applied, AI may dramatically improve productivity, lower certain costs for businesses, give workers and employers greater flexibility, and advance accessibility in the workplace. At the same time, AI poses unique compliance challenges under wage and hour laws. Specifically, the Fair Labor Standards Act (FLSA) requires employers to strictly adhere to the federal minimum wage and overtime requirements when compensating covered employees for all hours worked. However, the rapid growth of AI has fundamentally disrupted the traditional understanding of what constitutes compensable hours worked. The use of AI in the workplace is also increasingly relevant to the coverage and classification of both workers and employers under wage and hour laws, especially with respect to independent contractors, joint employer status, and several FLSA exemptions.

This Article examines the interaction between AI and wage and hour law. The Article begins by exploring the widespread uses of AI and its impact on wage and hour compliance. After examining the specific wage and hour provisions implicated by AI, the Article then shifts to applying wage and hour law to AI-related risks. The Article concludes by arguing that federal agencies need to issue more guidance and should encourage voluntary compliance programs to proactively address such risks. Finally, the Article discusses best practices to guide employers in using AI to ensure wage and hour compliance.

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INTRODUCTION

Artificial intelligence (AI) has revolutionized the workplace including the wage and hour arena.¹ Some employers are increasingly deploying AI systems to make personnel decisions, determine pay, and monitor and evaluate performance.² Major companies are using AI-powered timekeeping systems or applications that can track when workers sign in and out of work, and the software allows employers to capture each second worked and to calculate their pay.³ AI is also being used for automated scheduling and staffing purposes based on historical data, thereby improving employers' ability to monitor and control attendance and reduce overtime hours worked.⁴ Companies like Amazon are using AI to determine the exact number of drivers needed in a specific area at any moment, based on factors including package volume, weight, and travel time.⁵ AI-driven technologies are also increasingly being used for customer-facing functions such as predictive call routing that matches customers directly with agents based on the customer's specific characteristics, including their personality and history.⁶

Similarly, innovative AI-powered robotic systems provide healthcare professionals with the ability to perform complex procedures with greater accuracy compared to traditional methods.⁷ Telesurgery is also rapidly progressing with the help of AI to enable surgeons to perform operations from remote locations, providing patients with greater access to critical surgical services and more specialized surgeons.⁸ AI has also entered the automotive industry by enabling vehicles to travel without any human assistance.⁹

1. See generally Jeffrey W. Brecher & Eric Magnus, *Managing Wage and Hour Risks in A Digitally Connected Workforce Addicted to Technology*, 20 J. INTERNET L. 3, 12 (2017).

2. See Keith E. Sonderling, Bradford J. Kelley, & Lance Casimir, *The Promise and the Peril: Artificial Intelligence and Employment Discrimination*, 77 U. MIAMI L. REV. 1, 3 (2022) (explaining that AI is used at all stages of the employment lifecycle from recruitment to firings).

3. See Brishen Rogers, *The Law and Political Economy of Workplace Technological Change*, 55 HARV. C.R.-C.L. L. REV. 531, 565 (2020).

4. *Id.* at 537; see also David Hippen, *The Labor Year in Review, and What to Expect in 2019*, CONSTANGY 3 (Feb. 13, 2019), <https://perma.cc/V2PM-8N9T>.

5. See David Deming, *The Robots Are Coming. Prepare for Trouble.*, N.Y. TIMES (Jan. 30, 2020), <https://perma.cc/W5DP-V8R7>.

6. See IBM AI Insights Contributor, *How AI Is Revamping the Call Center*, FORBES (June 25, 2021), <https://perma.cc/E75K-2QJZ>.

7. See Samuel D. Hodge, *The Medical and Legal Implications of Artificial Intelligence in Health Care—an Area of Unsettled Law*, 28 RICH. J. L. & TECH. 405, 421 (2022) (explaining that the robotic units are usually equipped with a camera and mechanical arms that hold the surgical instruments while the doctor operates).

8. See Bill Siwicki, *Boosted by Virtual Reality and AI, Telesurgery Is on the Rise*, HEALTHCARE IT NEWS (Sept. 21, 2021, 10:43 AM), <https://perma.cc/Z3CS-RJ68>.

9. See Hodge, *supra* note 7, at 413 (explaining that the information is usually managed through machine learning algorithms modeled after real-world situations).

Despite its Orwellian overtones, the use of AI in the workplace has numerous benefits. AI can help companies monitor and control attendance and overtime while also providing employees with more control over their work, allowing them to be more engaged and productive.¹⁰ AI-driven scheduling can benefit workers by allowing them to specify times they want to work and give them more flexibility, thereby increasing worker satisfaction and improving retention rates.¹¹ Automated scheduling and staffing has also been shown to reduce a company's costs by ensuring that worksites are not over (or under) staffed and whether overtime or less desirable shifts are disproportionately assigned by race or sex.¹² In addition, robotic systems, exoskeleton suits, and other wearable technologies have been shown to supplement mobility and muscle function, which not only tends to mitigate disabilities, but also reducing workplace injuries and enhancing general workplace safety.¹³

Despite these and other benefits of AI, employers also face a variety of wage and hour compliance risks.¹⁴ Significantly, AI tools remain subject to existing laws, notably the Fair Labor Standards Act (FLSA) which sets the federal minimum wage and overtime requirements for employers when compensating covered employees for all hours worked each work week.¹⁵ Under the FLSA, which was enacted in 1938 when AI technologies were mere science fiction, employees who are not exempt from the minimum wage or overtime requirements must generally be paid no less than the minimum wage for all hours worked in a work week and, for all hours worked in excess of forty, one-and-one-half their regular rate of pay.¹⁶ AI and other technologies have made it easier to perform many jobs away from traditional employer workplaces, which has increased opportunities for employees to work at home and elsewhere.¹⁷ The COVID-19 pandemic accelerated this transition. As a consequence, the line between work and non-work time is often less defined, with employees interspersing work and non-work tasks throughout the workday. This trend poses challenges to identify, record, and compensate time spent working.¹⁸

Depending on the ways in which they manage these issues, employers may face wage and hour liability stemming from a myriad of issues associated with

10. See Phippen, *supra* note 4, at 3.

11. See Rogers, *supra* note 3, at 565-66.

12. *Id.* at 566 (using the example of female or African-American employees who are frequently assigned less-desirable shifts if they have received those shifts in the past due to discrimination).

13. See Sonderling et al., *supra* note 2, at 5.

14. See generally Brecher & Magnus, *supra* note 1.

15. Fair Labor Standards Act 29 U.S.C. §§ 201-219 (1938); see also Part II *infra* (discussing the FLSA and state wage and hour law analogues).

16. *Id.*

17. See Nancy B. Schess, *Then and Now: How Technology Has Changed the Workplace*, 30 HOFSTRA LAB. & EMP. L. J. 435, 438 (2013).

18. See *id.*

AI, especially if the AI is poorly designed or misused.¹⁹ Indeed, employers could face potential liability stemming from overtime calculation issues, irregular work schedules, and violations of work- and break-related restrictions, including prohibitions on non-exempt employees doing work outside of working hours.²⁰ For instance, employers may face FLSA exposure if they rely on AI-driven monitoring software to record the number of hours an employee works if the tool does not fully account for all time worked, especially in the absence of clear training, documentation requirements, and oversight.²¹ AI-powered monitoring software can potentially fail to account for the time employees spend working away from their traditional workstation, including the time employees might use reviewing hard copy documents, reading printouts, taking handwritten notes, thinking, participating in a Zoom conference or a work call while on a walk, or any offscreen engagement with clients or patients.²² Consequently, employees may end up doing extra work beyond the forty hours their employer expects them to work, which may entitle non-exempt employees to additional pay.²³

Moreover, AI is increasingly impacting the coverage and classification of workers as technology has progressively enabled businesses to influence and possibly control the work of individuals performing services for them or under their brand.²⁴ For instance, critics of the “gig economy” point to Uber as an example of a company that uses algorithms to manage its drivers, while at the same time classifying them as independent contractors rather than employees.²⁵ The fact that AI allows for workers to be managed by algorithms—in some cases, even without using a platform—raises traditional wage and hour liability concerns in novel situations.²⁶ The use of AI and algorithmic technologies may also profoundly alter workers’ primary duties, especially AI-powered programs such as ChatGPT and its newer iterations that produce responses to questions or prompts which have made headlines by writing essays on complex topics and even passing medical and law school exams.²⁷ The use of such AI tools in the

19. See generally Sonderling et al., *supra* note 2 (discussing employment law risks with using AI in the workplace).

20. See Schess, *supra* note 17, at 437-38.

21. See Chris Deubert, *Beware Employee Tracking as a Response to ‘Quiet Quitting’*, LAW360 2 (Aug. 29, 2022), <https://perma.cc/SQ8B-QKGA>.

22. *Id.*

23. *Id.*

24. See Jeffrey M. Hirsch, *Joint Employment in the United States*, 13 ITALIAN LABOUR LAW E-JOURNAL 55, 56 (2020), <https://perma.cc/S9QV-5LRZ> [hereinafter Hirsch, *Joint Employment in the United States*]; see also Jeffrey M. Hirsch, *Future Work*, 2020 U. ILL. L. REV. 889, 924-25 (2020) [hereinafter Hirsch, *Future Work*] (arguing that technology has exacerbated this problem because “gig and other ‘on demand’ workers are often an ill-fit with the traditional employee classification analysis”).

25. See Rogers, *supra* note 3, at 571.

26. *Id.*; see also Miriam A. Cherry & Antonio Aloisi, “*Dependent Contractors*” in the Gig Economy: A Comparative Approach, 66 AM. U. L. REV. 635, 639 (2017).

27. See Nicole Black, *The Case for ChatGPT: Why Lawyers Should Embrace AI*, ABA JOURNAL (Feb. 21, 2023), at 2 <https://perma.cc/3B2M-X4WE>.

workplace may adversely affect an employee's discretion, authority, and creativity, which certain FLSA exemptions require.²⁸ This technology, therefore, calls into question whether employees who were previously classified as exempt under the FLSA can now argue that they should no longer be so, which might entitle them to additional pay and expose employers to costly penalties and litigation.²⁹

In a similar vein, AI is also increasingly influencing who is deemed the employer of any particular employee.³⁰ Because AI makes it far easier for businesses to exert control over the work of individuals who nominally are employed by other firms, the increased adoption of AI has made joint employment status more relevant.³¹ For instance, Amazon requires its contract drivers to use specific delivery routes set by algorithms and follow detailed uniform personnel policies, including regarding required pay and benefits, hygiene, and social media use.³² If businesses are considered joint employers, they each share the responsibility for minimum wage and overtime violations under the FLSA.³³ As technology allows businesses to exercise more control over work, especially with monitoring software, defining anyone's employer becomes more difficult and puts certain companies at a higher risk of being considered a joint employer and therefore jointly liable for wage and hour law violations.³⁴

In addition, not paying workers for time spent putting on or taking off wearable technologies or robotics could expose employers to FLSA liability for unpaid wages.³⁵ As a general rule, the FLSA requires employers to compensate covered employees for time spent changing and washing clothes that they are required to wear for work.³⁶ Therefore, an important question is whether companies that require their employees to put on robotics or wearable technologies to perform their jobs must compensate them for the time spent changing into and out of the devices, in addition to any time spent maintaining the technologies.³⁷

Self-driving cars and vehicles used as mobile offices will also trigger highly unique wage and hour compliance challenges. As a general wage and hour rule, the time employees spend during their normal commute (i.e., traveling from home to their regular workplace before the beginning of the workday and from the workplace back home at the end of the workday) is not considered work time

28. See Deubert, *supra* note 21, at 2-3.

29. *Id.* at 3.

30. See Hirsch, *Joint Employment in the United States*, *supra* note 24, at 56-60.

31. *Id.* at 60.

32. See Andrew Elmore, *Regulating Mobility Limitations in the Franchise Relationship as Dependency in the Joint Employment Doctrine*, 55 U.C. DAVIS L. REV. 1227, 1278 (2021).

33. See Hirsch, *Joint Employment in the United States*, *supra* note 24, at 59-60.

34. *See id.*

35. See GARRY MATHIASON ET AL., LITTLER, THE TRANSFORMATION OF THE WORKPLACE THROUGH ROBOTICS, ARTIFICIAL INTELLIGENCE, AND AUTOMATION: EMPLOYMENT AND LABOR LAW ISSUES, SOLUTIONS, AND THE LEGISLATIVE AND REGULATORY RESPONSE, LITTLER 2, 11 (Jan. 2016), <https://perma.cc/G2BM-DD2D>.

36. *Id.* (citing *Sandifer v. U.S. Steel Corp.*, 571 U.S. 1, 6 (2014)).

37. See MATHIASON ET AL., *supra* note 35, at 11.

and therefore is not compensable.³⁸ However, the rise of autonomous vehicles, which some describe as “offices on wheels,” elucidates complicated issues if the technologies enable employees to perform work no matter how they commute to the workplace.

To make matters even more complicated, businesses must comply with not only the FLSA, but also the wage and hour laws in state and local jurisdictions. In addition to the FLSA, many states have their own wage and hour laws that often provide greater protections for workers that go well beyond the federal requirements.³⁹ As a result, even if an employer complies with the FLSA, it can still be found to be in violation of state and local wage and hour requirements. These state and local laws will also become more pertinent with the enormous growth of AI in the workplace.

At this time, the Wage and Hour Division (“WHD”), the agency within the U.S. Department of Labor (“DOL”) that is responsible for enforcing and administering the FLSA, has not addressed the issue of AI and wage and hour compliance. However, there are preemptive steps that federal agencies like WHD can take to help ensure compliance. Notably, WHD should encourage and incentivize companies to create voluntary compliance programs so that employers can reliably determine and ensure they comply with their legal and ethical obligations. Moreover, WHD should strive to provide frequent and consistent guidance to clarify how the law and regulations apply—or at least how it will apply the law in enforcement proceedings—in these and other contexts.⁴⁰

Ultimately, the lack of any guidance applying wage and hour law and regulations in emerging circumstances involving AI complicates, if it does not frustrate entirely, the development of best practices that will reliably and proactively prevent potential FLSA liability. Fortunately, practitioners and scholars have already identified ways in which employers may improve compliance with wage and hour law and mitigate AI-related risks, especially in recent years with the explosive growth of remote work during the COVID-19 pandemic.⁴¹

This Article examines the interaction between AI technologies and wage and

38. See 29 U.S.C. § 254(a)(1) (“walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which [an] employee is employed to perform” are not compensable activities); 29 C.F.R. § 785.35 (2023) (“Normal travel from home to work is not worktime.”).

39. When a federal, state, or local minimum wage or overtime law differs from the FLSA, the employer must comply with both laws and meet the standard of whichever law gives the employee the greatest protection. See 29 U.S.C. § 218(a); see also 29 C.F.R. § 778.5 (2023) (“Compliance with other applicable legislation does not excuse noncompliance with the Fair Labor Standards Act.”).

40. See Keith E. Sonderling & Bradford J. Kelley, *The Sword and the Shield: The Benefits of Opinion Letters by Employment and Labor Agencies*, 86 MO. L. REV. 1171, 1178 (2021) (arguing that providing more WHD guidance is essential, especially with the use of modern workplace technologies).

41. See, e.g., Roscoe Mutz, *Remote Work Best Practices (And Cautionary Tales)*, AM. BAR ASS’N (Mar. 3, 2021), <https://perma.cc/NA9H-GRYP>.

hour law. Part I of this Article provides a brief overview of AI and its uses in the wage and hour arena for the purpose of laying the groundwork for the special employment challenges this entails. To understand the interplay between AI and wage and hour protections, Part II provides a background discussion of the FLSA and briefly explores its state and local counterparts. Against this backdrop, Part III then applies the FLSA to the most significant AI-related wage and hour compliance challenges. Finally, Part IV provides a few recommendations to help ensure compliance with wage and hour laws, including the need for voluntary compliance programs, guidance, and well as best practices that employers should consider for mitigating AI-related wage and hour risks.

I. OVERVIEW OF AI AND WAGE AND HOUR USES

This Part provides a brief overview of workplace AI, emerging technologies, and robotics. This Part also illustrates the architecture and features of AI-driven tools in the workplace and discusses the widespread uses of AI used for wage and hour purposes.

A. AI in a Nutshell

Historically, AI has been difficult to define but has generally been treated as an expansive term that describes many different technologies used to approximate human behavior and reasoning, including machine learning, automation, and natural language processing.⁴² For the purposes of this Article, AI refers to computer systems and algorithms utilized in a work environment to perform tasks that typically require human-level intelligence to optimize aspects of the workplace, including enhancing productivity, streamlining operations, and improving decision-making. Although some of the workplace technologies discussed in this Article may technically fall outside of the various definitions of “AI,” these technologies are frequently used to enhance human capabilities and may involve AI or be used in concert with technologies that are more commonly characterized as AI.⁴³ Indeed, AI is increasingly becoming a critical component

42. See Sonderling et al., *supra* note 2, at 13 (defining AI); see also Pauline T. Kim & Matthew T. Bodie, *Artificial Intelligence and the Challenges of Workplace Discrimination and Privacy*, 35 ABA J. LAB. & EMP. L. 289, 290 (2021) (contending that AI is challenging to define but that the term is “used interchangeably with other terms such as machine learning, algorithmic decision-making, and automated decision-making.”).

43. Video interviews provide an apt illustration of why AI is broadly defined for purposes of this Article. Employers often use video interviews which may utilize AI technology to varying degrees or may not use AI at all. See Zahira Jaser & Dimitra Petrakaki, *Are You Prepared to Be Interviewed by an AI?*, HARV. BUS. REV. (Feb. 7, 2023), <https://perma.cc/UMM6-RQR3>. In some cases, automated video interviews are conducted but do not necessarily involve AI decision-making tools. *Id.* In other cases, AI-assisted automated video interviews are conducted in which AI is used to make recommendations by analyzing a job candidate’s features (e.g., facial expressions or tone of voice); a report is then generated

of other emerging technologies, including video interviews, robotics, autonomous vehicles, and monitoring devices.⁴⁴ Product manufacturers and system developers have often avoided describing their products as “AI” but have instead opted, for instance, to describe their technologies within some form of the word “automation.”⁴⁵

Employers usually engage third-party software vendors who develop and sell the AI-powered algorithms that are then used to perform a wide variety of Human Intelligence Tasks.⁴⁶ As a threshold matter, employers rather than vendors are usually liable for wage and hour violations since the FLSA only covers employers.⁴⁷ More broadly, scholars have explained that as long as the vendor can show that its product was “designed for a particular purpose and was reasonably accurate and effective in accomplishing that purpose” it can avoid liability.⁴⁸

Although AI has been used in the workplace for years, AI tools became even more widely used during the COVID-19 pandemic, when many employers chose to conduct business remotely long after mandatory “stay home” government mobility restrictions ended. These new workplace realities increased and sped the adoption of AI tools in a variety of facets of the workplace.⁴⁹ Indeed, surveys indicate that up to 55% of companies accelerated their AI adoption plans because of the COVID-19 pandemic and 67% of companies expect to further accelerate their AI implementation strategy going forward.⁵⁰

B. Uses of AI for HR Purposes

AI has revolutionized traditional HR functions as employers frequently use AI to determine compensation, monitor and evaluate performance, and make personnel decisions about discipline, promotions, and even terminations.⁵¹ Some AI vendors offer tools that assist with the classification of employees as either exempt or non-exempt for payroll calculation.⁵² Traditional payroll functions such

that is reviewed by human decision-makers. *Id.* At other times, AI-led automated video interviews are conducted where AI tools make the hiring decision without any human involvement. *Id.*

44. *Id.*; see also Hirsch, *Future Work*, *supra* note 24, at 896.

45. See MATHIASON ET AL., *supra* note 35, at 3 (defining automation as “automatic operation or control of equipment, a process, or a system”).

46. *Id.* at 15.

47. See 29 U.S.C. § 203(d) (defining employer under the FLSA).

48. See Sonderling et al., *supra* note 2, at 16.

49. See *id.* at 20.

50. See Joe McKendrick, *AI Adoption Skyrocketed Over the Last 18 Months*, HARV. BUS. REV. (Sept. 27, 2021), <https://perma.cc/RSS3-TB7B>.

51. See Richard A. Bales & Katherine V.W. Stone, *The Invisible Web at Work: Artificial Intelligence and Electronic Surveillance in the Workplace*, 41 BERKELEY J. EMP. & LAB. L. 1, 22 (2020).

52. See Arvind Kugasia, *Take a Leap in Payroll Management Using Advanced AI Capabilities*, AZILEN (Apr. 10, 2019), <https://perma.cc/6QQK-9GVF>.

as automated timekeeping and scheduling programs are commonly used to interface with payroll-processing services.⁵³ In recent years, payroll vendors have been focusing on “smaller businesses by introducing new technologies designed to make running payroll” on mobile devices more intuitive and simpler.⁵⁴ For example, in 2021, ADP debuted an AI-driven payroll application for small businesses that uses natural language processing technology to perform commands such as adding new employees, changing salaries, and even adding employee bonuses.⁵⁵ ADP’s AI-driven application even helps employers handle their employees’ court-ordered wage garnishments which requires that some of an employee’s wages not be paid to the employee.⁵⁶

Monitoring software is sometimes used to generate timecards and determine employees’ pay. One company offers software to monitor remote workers by taking screenshots of their computers at set intervals and collecting data, including keyboard activity and application use, to generate a timecard every 10 minutes.⁵⁷ The timecard then creates a logbook for the workers and their managers that shows how the worker spent their time. Another business reportedly uses software that generates a photo of employees’ faces as well as screenshots of the employees’ computer screens every 10 minutes throughout the workday.⁵⁸ The company then uses that information to pay the employees and other workers only for the time when the system detected them to be actively working (e.g., moving a mouse or a keystroke) based on the photos. If the photo captures an employee during a brief moment of inactivity (e.g., a short coffee break of around 30 seconds or a quick bathroom break) such periods of perceived inactivity are considered non-compensable idle time, so the system would dock an employee’s pay for the entire 10-minute duration.⁵⁹

In addition, AI is being used for automated timekeeping in which software “tracks when workers sign in and out of work” and then determines their total pay for a set period.⁶⁰ Some AI tools have taken over the traditional clocking in and out procedures. For instance, PunchClock AI is a fully digital time clock that allows any business with hourly paid workers to calculate an employee’s weekly,

53. See Rogers, *supra* note 3, at 565.

54. See Dave Zielinski, *Innovations Shake Up Payroll Technology*, SHRM (June 24, 2022), <https://perma.cc/F5Q4-S8X3>.

55. *Id.*

56. *Id.* (explaining that “Roll can help remove the stress of this by tracking garnishments and making the payments for the employer.”)

57. See Valerio De Stefano, “*Negotiating the Algorithm*”: *Automation, Artificial Intelligence, and Labour Protection*, 41 COMPAR. LAB. L. & POL’Y J. 15, 26 (2019).

58. See Jodi Kantor & Arya Sundaram, *The Rise of the Worker Productivity Score*, N.Y. TIMES (Aug. 14, 2022), <https://perma.cc/S49Q-JNF3>; see also Jon Hyman, *The Wage and Hour Implications of Employee Electronic Surveillance*, LEXBLOG (Aug. 25, 2022), <https://perma.cc/K3LY-67Z4>.

59. See Kantor & Sundaram, *supra* note 58; see also Hyman, *supra* note 58.

60. See Rogers, *supra* note 3, at 565.

biweekly, or monthly pay.⁶¹ Some AI vendors have focused on more nuanced areas such as attorney billable hour automated timekeeping. For instance, Ping provides AI-driven software for attorney billing that uses AI and machine learning to determine whether an activity is billable, which client to bill, as well as a detailed description of the billed activity and its specific code.⁶² Afterwards, the software presents the timesheet to the user for review prior to submitting it for final invoicing.⁶³

DOL has recognized the value of timekeeping applications. In 2011, DOL announced the launch of its first smartphone application described as “a timesheet to help employees independently track the hours they work and determine the wages they are owed.”⁶⁴ In 2022, DOL expanded access to its timekeeping mobile application that tracks workers’ hours, tracks their breaks and overtime, and calculates wages due regardless of whether employees are salaried or paid hourly.⁶⁵ The application also performs complex earnings calculations, enabling users to select from several pay frequency options depending on the work done on a particular day. However, critics of DOL’s application are skeptical of private employees using a government application because of security and privacy concerns, as well as apprehensions concerning how the government would use the information from the application for enforcement purposes.⁶⁶ In addition, most employers are hesitant about putting their employees in contact with DOL since using the agency’s application “makes communication between employees and investigators much more likely.”⁶⁷

AI has also transformed the scheduling and staffing landscape in recent years. Novel algorithms are used to collect data such as weather reports and real-time customer movement based on in-store sensors to predict buyer demand and determine their specific staffing needs.⁶⁸ These AI tools can also substantially reduce the problem of overstaffing and understaffing, which benefits employees

61. See PunchClock AI: Accurate Timekeeping for Tough Environments, <https://perma.cc/JSY4-LHMM> (last visited Apr. 15, 2023).

62. Josh Constine, *Lawyers Hate Timekeeping — Ping Raises \$13M to Fix it with AI*, TECHCRUNCH (Nov. 12, 2019), <https://perma.cc/E53B-NWJZ>.

63. *Id.*

64. See News Release, U.S. Dep’t of Lab., *Keeping Track of Wages: The U.S. Labor Department Has an App for That!* (May 9, 2011), <https://perma.cc/9YT4-RVCJ>; see also Richard I. Greenberg, *Department of Labor Launches Controversial App to Track Hours Worked*, JACKSON LEWIS (May 13, 2011), <https://perma.cc/32LW-X3XE>.

65. See News Release, U.S. Dep’t of Lab., *U.S. Department of Labor Launches Android Timesheet App for Workers, Employers to Record Work Hours, Overtime, Breaks; Compute Wages* (June 30, 2022), <https://perma.cc/8SNP-CL29>.

66. See Kate Tornone, *DOL Expands Timekeeping App Aimed at Empowering Workers*, HR DIVE (June 30, 2022), <https://perma.cc/3225-TMLP>.

67. *Id.* (noting: “On balance, however, the costs and risks inherent in using the agency’s app seem to outweigh any conceivable benefit for employers.”).

68. See Pegah Moradi & Karen Levy, *The Future of Work in the Age of AI: Displacement or Risk-Shifting?*, THE OXFORD HANDBOOK OF ETHICS OF AI 7 (2020).

and employers.⁶⁹ Reports show that predictive models utilizing data related to demographics and income can enable companies to forecast their staffing needs with up to 80 percent accuracy at the retail level.⁷⁰ Algorithmic scheduling can also benefit workers by allowing them to specify times that they would ideally like to work.⁷¹ Likewise, because algorithmic tools can analyze historical data and identify insights and efficiencies in the scheduling process, automated scheduling can help managers optimize employees' schedules, thereby reducing a company's costs and improving worker satisfaction.⁷² One company claims that its AI-driven tools create fairer and more balanced schedules, while allowing companies to minimize overtime hours and ensure that their best employees are working at optimal times.⁷³ Another company that provides AI-powered scheduling claims that its platform saves time by removing the human element from creating schedules, modifying schedules, and addressing scheduling grievances.⁷⁴ This company further claims that eliminating the uncertainty around scheduling and giving employees quick and easy access to their hours can improve overall morale and keep the staff both happy and informed.⁷⁵ A recent medical society study concluded that AI-based scheduling significantly improved physician engagement and reduced burnout by creating fair and flexible schedules that help (or helped) support work-life balance.⁷⁶

On the other hand, critics of algorithmic scheduling contend that the practice makes scheduling precarious and injects instability into the lives of low-wage workers.⁷⁷ For instance, a company that does not accurately predict consumer demand may end up understaffed, thus subjecting its workers to a frantic pace of work.⁷⁸ Some critics have identified three primary scheduling practices associated with algorithmic scheduling that negatively impact workers. First, AI-driven scheduling has generated irregular "split-shift" schedules whereby workers will

69. See Rogers, *supra* note 3, at 565 (noting that algorithms are used to predict consumer demand based on historical sales in addition to factors like weather reports and this information is used to "schedule workers accordingly in an effort to ensure that worksites are neither over- nor understaffed.").

70. Jorge Amar et al., *How AI is Helping Revolutionize Telco Service Operations*, MCKINSEY & CO. (Feb. 25, 2022), <https://perma.cc/NHU8-H2KF>.

71. See Rogers, *supra* note 3, at 565.

72. *Id.* at 566.

73. *Using Artificial Intelligence as a Scheduling Tool*, CELAYIX, <https://perma.cc/GFV9-8UW8> (last visited May 13, 2023).

74. Tito Goldstein, *The Benefits of AI-Driven Scheduling*, TEAMBRIDGE <https://perma.cc/W6FM-L7Z8> (last visited May 13, 2023).

75. *Id.*

76. See American Soc'y of Anesthesiologists, *Using AI to Create Work Schedules Significantly Reduces Physician Burnout, Study Shows* (Jan. 28, 2022), <https://perma.cc/HD9V-ZWUH>. The study also showed that "the AI-based scheduling software granted more vacation days," reduced errors, and provided greater "flexibility and predictability, compared [with] the previous staff-created scheduling system."

77. See Moradi & Levy, *supra* note 68, at 7.

78. See Rogers, *supra* note 3, at 566.

work shortened shifts during periods of high demand and are required to clock out in-between, thus creating significant periods of non-work time between shifts.⁷⁹ Second, algorithmic scheduling has led to work schedules that are sometimes subject to high fluctuations in which workers work many hours one week but substantially fewer hours the following week.⁸⁰ Third, AI-based scheduling has increased the use of short-notice scheduling, including the use of on-call shifts, in which workers must be available for a shift but they are not notified whether they are required to come in until shortly before the shift starts.⁸¹ Ultimately, critics contend that these scheduling practices could potentially destabilize workers' lives by interfering with their personal activities and lead to financial stress.⁸²

Additionally, AI programs are increasingly used to identify and measure employee activity and output.⁸³ Historically, employers could more easily monitor their employees' attendance and performance when they were all in specific physical locations on a daily basis, but many companies have turned to monitoring software to help ensure workers remain productive while telecommuting or working remotely.⁸⁴ Indeed, studies show that around 80% of large employers are using some type of monitoring software at the workplace.⁸⁵ AI and machine learning are frequently used to monitor worker on-site and remote activities, including overall computer usage, active and idle time, employee log-in times, online activities, documents accessed, and employee performance.⁸⁶ Productivity monitoring has spread to white collar professions that require graduate degrees, including doctors and lawyers.⁸⁷ AI and algorithms may recommend that employees who fail to meet certain productivity measures be subject to lost pay and termination.⁸⁸

In a similar way, AI is increasingly being used to incentivize productivity. For instance, some platform-based services such as Uber use AI to incentivize

79. Moradi & Levy, *supra* note 68, at 7.

80. *Id.*

81. *Id.* at 7-8.

82. *Id.* at 8.

83. See Ifeoma Ajunwa, *Algorithms at Work: Productivity Monitoring Applications and Wearable Technology as the New Data-Centric Research Agenda for Employment and Labor Law*, 63 ST. LOUIS U. L.J. 21, 43 (2018).

84. See Deubert, *supra* note 21, at 1.

85. See Alyssa Ward, *Bringing Work Home: Emerging Limits on Monitoring Remote Employees*, JD SUPRA (Nov. 1, 2022), <https://perma.cc/6LSW-SYX6>.

86. See Todd R. Dobry & Taylor M. Napoli, *Can Employers Use Artificial Intelligence and Data Analytics to Track Remote Workers?* JACKSON LEWIS (Mar. 3, 2021), <https://perma.cc/X9GQ-V79Y>.

87. See Kantor & Sundaram, *supra* note 58, at 3.

88. See Sonderling et al., *supra* note 2, at 15; see also Kantor & Sundaram, *supra* note 58, at 3.

driver productivity based on predictive analysis and tailored incentives.⁸⁹ Likewise, retail stores use AI to evaluate and incentivize workers based on an automated analysis of their interactions with customers.⁹⁰ One company that provides workplace surveillance software claims that these products improve employee engagement, transparency, objective decision-making, and produce “stronger productivity and higher career satisfaction.”⁹¹

C. Customer-focused AI

AI is now widespread in customer-facing service jobs, like call centers, to improve customer service while reducing complexity and operational costs.⁹² According to a report, by 2031, AI-driven conversational AI chatbots and virtual assistants are expected to handle 30% of basic interactions that would have otherwise been handled by a human agent.⁹³ Some companies claim that call centers using conversational AI improves customer and agent satisfaction by reducing wait times and answering certain basic questions more quickly.⁹⁴ Companies also claim that AI and machine learning enable predictive routing to match customers to specific agents who are best able to handle an issue by analyzing customer interactions.⁹⁵ The predictive routing uses AI to match callers with specific customer personality models which are then used to route calls to agents who can best handle those personality types.⁹⁶ In addition, AI tools are used to provide the live agent with critical information about the caller such as their name and the reason why they are calling before the human agent talks to the customer to improve outcomes. Another form of AI tool known as sentiment analysis is used by companies in which virtual assistants can parse customers’ speech or writing to determine the best way to address an issue and then recommend several available solutions to the human agent who will decide on the best way to proceed.⁹⁷ As a result, AI and machine learning improve resolution rates, thus resulting in better overall customer experiences and improving companies’ brand reputation.⁹⁸ The reduction in call volume also permits agents at call centers to focus on more complex matters instead of having to answer simple or repetitive questions, thereby relieving human agents of significant burdens and time.⁹⁹

89. See Moradi & Levy, *supra* note 68, at 11.

90. *Id.*

91. See Leonie Cater & Melissa Heikkla, *Your Boss is Watching: How AI-Powered Surveillance Rules the Workplace*, POLITICO (May 27, 2021), <https://perma.cc/MVN9-EKGZ>.

92. See IBM AI Insights Contributor, *supra* note 6.

93. See Madalina Belciu, *Call Center Modernization with AI*, IBM (Dec. 14, 2022), <https://perma.cc/8WAJ-RH97>.

94. *Id.*

95. *Id.*

96. See IBM AI Insights Contributor, *supra* note 6.

97. *Id.*

98. See Belciu, *supra* note 93.

99. See IBM AI Insights Contributor, *supra* note 6.

In addition to call centers, restaurants are also utilizing AI in a wide variety of ways. Interestingly, there has been some litigation involving the use of AI in restaurants. In *Carpenter v. McDonald's Corp.*, a plaintiff brought a putative class action against McDonald's under the Illinois Biometric Information Privacy Act.¹⁰⁰ The complaint alleged that McDonald's employed AI voice recognition technology at certain drive-through restaurants by enabling customers to place orders without any actual human interaction, thus helping the fast-food chain reduce staff requirements and streamline operations.¹⁰¹ The complaint further alleged that McDonald's incorporated "machine-learning routines" that combined voiceprint recognition with license plate scanning technology "to identify unique customers regardless of which location they visit and present them certain menu items based on their past visits."¹⁰²

The AI voice assistant allegedly "collect[ed] customers' voiceprint biometrics in order to be able to correctly interpret customer orders and to identify repeat customers to provide a tailored experience" and "determine[s] such unique features of the customer's voice as pitch, volume, duration, as well as to obtain identifying information such as the customer's age, gender, accent, nationality, and national origin."¹⁰³ Critically for the Illinois Biometric Information Privacy Act claim, the plaintiff alleged that McDonald's did not notify its customers that their voiceprint biometric information was being used and collected, nor did McDonald's obtain their consent to do so.¹⁰⁴ McDonald's filed a motion to dismiss the plaintiff's complaint which the court denied, in part because the plaintiff plausibly alleged that the restaurant collected customers' voiceprint biometrics via AI voice-assistant technology.¹⁰⁵

AI tools are also being used in client-facing industries such as the legal industry, with legal professionals using AI for legal research, writing, and discovery.¹⁰⁶ Casetext, an AI vendor, provides a legal research platform that utilizes AI to automate legal research that is used by more than 8,500 law firms across the United States.¹⁰⁷ Casetext also offers AI-powered technology that "automates critical, substantive elements of litigation."¹⁰⁸ Casetext has also recently started

100. *Carpenter v. McDonald's Corp.*, 580 F. Supp. 3d 512, 514 (N.D. Ill. 2022).

101. *Id.* at 514, 516.

102. *Id.* at 516.

103. *Id.*

104. *Id.*

105. *Id.* at 517 ("Based on the facts pleaded in the complaint, including the referenced Patent, it is reasonable to infer—though far from proven—that Defendant's technology mechanically analyzes customers' voices in a measurable way such that McDonald's has collected a voiceprint from Plaintiff and other customers.")

106. See Amy B. Cyphert, *A Human Being Wrote This Law Review Article: GPT-3 and the Practice of Law*, 55 U.C. DAVIS L. REV. 401, 417 (2021).

107. See Press Release, Fisher Phillips, Fisher Phillips Among First Law Firms in the World to Leverage Artificial Intelligence Tool WeSearch (Feb. 3, 2022), <https://perma.cc/5H7C-9JK5>.

108. *Id.*

providing law firms with “WeSearch,” an AI search tool that utilizes transformer-based neural networks to review large sets of legal documents. Casetext claims that the technology “mirrors the way human brains can separate concepts from keywords, meaning attorneys no longer need to run traditional keyword searches; rather, they can run searches in internal document databases for specific concepts.”¹⁰⁹ Generative AI like ChatGPT have ushered in a sea of change in the legal industry with legal professionals using these programs to create summaries of cases, laws, and even pleadings filed with courts.¹¹⁰ ChatGPT is also being used to create initial drafts of demand letters, discovery requests, nondisclosure agreements, and employment agreements. Equally remarkable, ChatGPT can also be used to suggest language for use in correspondence and legal documents.¹¹¹

D. Remote Work and Productivity Enhancement Tools

AI tools have made it much easier to work remotely. Some AI-based tools have brought to bear analytics that monitor meeting lengths, engagement levels, and even recommend how to improve future gatherings.¹¹² Other AI-tools can automatically highlight the person speaking and then zoom in on the speaker or reduce background noise to improve the experiences of all attendees. In addition, AI-driven calendar and scheduling applications can be automated to plan a user’s workday based on deadlines and estimated time frames to help employees complete certain tasks or attend meetings; this technology can also help people identify availability for meetings.¹¹³ And some AI tools automatically group emails by priority levels, thereby minimizing the possibility that an important message is overlooked or seen as less important. Some AI workplace tools also feature snooze and do-not-disturb options that prevent people from getting emails when they need to focus. Tools also exist to help employees write emails more expeditiously.¹¹⁴

Many AI-powered technologies streamline workflows and automate tedious tasks, enabling both employers and employees to save time and resources. For instance, in 2023, Microsoft announced that it would start embedding generative AI, powered by OpenAI’s GPT-4, into its Word, PowerPoint, and Excel apps that will enable users to draft documents, create presentations based on prompts,

109. *Id.*

110. *See* Black, *supra* note 27, at 2.

111. *Id.*

112. *See* Emily Newton, *Can Artificial Intelligence Help Improve Remote Work?*, AI MAGAZINE (Apr. 30, 2022), <https://perma.cc/GLT2-WGT9>.

113. *Id.* (also noting AI-driven calendar and scheduling applications have a visual system that differentiates between daily duties a person must finish at a specific time versus those offering more freedom about when someone chooses to do them).

114. *Id.*

and even summarize long email threads.¹¹⁵

E. Wearable Technologies and Robotics

Wearable technologies and robotics are also increasingly common in the workplace. Smaller wearable technologies are frequently used to enhance worker productivity and efficiency. FedEx and UPS have used wearable technology, including ring scanners or other small devices, to monitor and assist workers with package sorting, pickup, and delivery.¹¹⁶ Wearable technologies have also been used to improve healthcare. For instance, one hospital requires its nurses to wear personal tracking devices which even record the time they take a break or go to the bathroom, and the practice is justified as a way of improving care.¹¹⁷

AI-powered robotic technologies are also increasingly being used for a variety of work-related purposes. In many cases, workers can control robots using a variety of techniques, including body, hand, arm, and tongue movements and even brain waves.¹¹⁸ Commentators argue that robots will greatly improve workers' speed, efficiency, and productivity, and will greatly increase their ability to perform tasks.¹¹⁹ Innovative AI robot systems have provided healthcare professionals with robotic arms to perform surgeries.¹²⁰ These robotic systems utilize AI-powered algorithms and deep machine learning data to recognize and predict a physician's actions and routines during a procedure. Robotic surgeries are becoming increasingly common for a wide range of medical purposes, including gynecologic procedures, cardiac surgery, prostate surgery, head and neck operations, and even hair transplant surgeries.¹²¹

In addition to the comparatively small wearable devices, there are larger wearable devices including exoskeletons and bionic suits that are comprised of robotics and computers that utilize novel algorithms.¹²² Many of these robots improve human strength and endurance and often take over tasks, such as lifting heavy objects that are dangerous, strenuous, or repetitive, thereby reducing the likelihood that workers will suffer serious work-related injuries or illnesses.¹²³

115. See Amanda Pérez Pintado, *New Microsoft Copilot Uses AI to Help Users Streamline Tasks across 365 Apps*, USA TODAY (Mar. 16, 2023, 3:38 PM ET), <https://perma.cc/B349-RJZE>.

116. See Ajunwa, *supra* note 83, at 36-37.

117. *Id.* at 24.

118. See Barbara Pfeffer Billauer, *The Bionic Plaintiff and the Cyborg Defendant: Liability in the Age of Brain-to-Computer Interface*, 25 VA. J.L. & TECH. 38, 57, 61, 63 (2021).

119. *Id.* at 63.

120. See Hodge, *supra* note 7, at 420-21.

121. *Id.* at 421-22.

122. See Ajunwa, *supra* note 83, at 40; see also Billauer, *supra* note 118, at 42-43 (noting that exoskeletons are being developed to help firefighters and rescue workers survive dangerous environments).

123. See MATHIASON ET AL., *supra* note 35, at 10-11; Sonderling et al., *supra* note 2, at 19 (noting that robotics enable disabled employees to operate in a more sustained way despite

Relatedly, because these robots are designed to assist workers in performing the physical requirements of their jobs, their use will greatly improve the ability of injured workers to return to work, shorten the period that employees miss from work, and decrease the re-injury rate.¹²⁴ For instance, exoskeletons have been shown to help individuals with restricted mobility caused by paralysis or weakened limbs to move or walk despite spinal injuries.¹²⁵ Bionic suits and exoskeletons may be especially useful in industries that involve strenuous manual work like the construction industry by reducing physical demands as well as other effects of such work.¹²⁶

II. WAGE AND HOUR LAW: A LEGAL LANDSCAPE

This Part examines the specific wage and hour risks inherent with the application of certain AI tools. But before this can be done, it is important to first establish a baseline understanding regarding the requirements of the FLSA and related regulations and longstanding interpretative guidance. This Part summarizes critical aspects of federal wage and hour law touching on AI in the workplace. Additionally, this Part will provide an overview of wage and hour laws at the state and local levels.

A. Fair Labor Standards Act

Under the FLSA, covered employers must pay non-exempt employees no less than the minimum wage for all hours worked and overtime pay for any hours worked over forty in a work week.¹²⁷ Some employees are exempt from one or both requirements if they satisfy certain compensation and duty requirements set forth in the statute and DOL's implementing regulations.¹²⁸ The FLSA's minimum wage and overtime pay requirements also do not apply to non-employees, including volunteers and independent contractors.¹²⁹ Moreover, the FLSA re-

injuries, thereby also reducing the re-injury rate among disabled workers); Billauer, *supra* note 118, at 42-43.

124. See Billauer, *supra* note 118, at 42-43.

125. See Sonderling et al., *supra* note 2, at 19.

126. See Ajunwa, *supra* note 83, at 40 (noting the benefits are particularly beneficial for the construction industry because the most experienced construction workers are over the age of forty); see also Konrad S. Lee & David W. Read, *Technology-Enhanced Employees and the Americans with Disabilities Act*, 18 J. HIGH TECH. L. 238, 258 (2018) (noting that exoskeletons and bionic suits will enable workers in dangerous jobs like undersea diving, timber cutting, and construction to move with ease during work tasks).

127. Fair Labor Standards Act, 29 U.S.C. §§ 206, 207.

128. See 29 U.S.C. § 213(a)(1); 29 C.F.R. § 541.602 (2019).

129. 29 U.S.C. § 203(e)(4)(A); *Franze v. Bimbo Foods Bakeries Distrib., LLC*, No. 17-CV-3556(NSR), 2019 WL 2866168, at *5 (S.D.N.Y. July 2, 2019), *aff'd sub nom*; *Franze v. Bimbo Bakeries USA, Inc.*, 826 F. App'x 74 (2d Cir. 2020) (explaining that independent contractors are non-employee entities who are contracted for limited purposes to perform work or

quires employers to maintain detailed recordkeeping of hours worked and remuneration to ensure that employees are paid correctly.¹³⁰ Because the FLSA requires employers to compensate employees for all hours worked, it does not distinguish between work performed at the office and work performed at any other location, an employer's requirement to keep accurate records of hours worked is the same regardless of where the work is performed.¹³¹

The FLSA provides DOL or aggrieved employees several remedies where minimum wage and overtime violations exist. An employee may file a private suit to recover back wages, liquidated damages in the amount equal to unpaid wages and overtime if employers are found liable for FLSA violations, and attorney's fees and court costs.¹³² DOL may file suit on behalf of employees for back wages, liquidated damages, and civil money penalties; DOL may also seek injunctions where appropriate, including for an employer's failure to keep proper records.¹³³ If employers are found liable for willfully violating the FLSA, they may be subject to criminal penalties, including fines and imprisonment.¹³⁴ Additionally, the FLSA prohibits employers from discriminating against employees who raise concerns about their wages or overtime pay and provides remedies for employees who are subjected to retaliation. In the event an adverse action is taken against an employee for engaging in protected activity, the aggrieved employee or DOL may file suit for relief, including reinstatement to his or her job, payment of lost wages, and damages.¹³⁵ Wage and hour cases are often brought by workers and former workers as class actions, known under the FLSA as collective actions.¹³⁶ The possibility of a collective action is even more pronounced in the AI context since plaintiffs may have an easier path alleging claims if the employer uses the same AI tool or algorithm for employment purposes.¹³⁷ DOL's WHD is responsible for the administration and enforcement of the FLSA.¹³⁸

provide services to other entities).

130. 29 U.S.C. § 211(c); 29 C.F.R. § 516.2(a) (2019).

131. 29 C.F.R. § 785.12 (2019).

132. 29 U.S.C. § 216. If the employer's violation is deemed willful, the FLSA provides a three-year statute of limitations. *See* 29 U.S.C. § 255(a). If the violation is not willful the statute of limitations is two years. *Id.*

133. *See* 29 U.S.C. § 216; 29 C.F.R. § 516.2 (2019).

134. 29 U.S.C. § 216(a) ("Any person who willfully violates any of the provisions of section 215 of this title shall upon conviction thereof be subject to a fine of not more than \$10,000, or to imprisonment for not more than six months, or both.").

135. 29 U.S.C. § 215(a)(3); 29 U.S.C. § 218(c); 15 U.S.C. § 2087.

136. *See* 29 U.S.C. § 216(b).

137. *See* Sonderling et al., *supra* note 2, at 24 (explaining that an algorithm can easily provide the common questions of law or fact necessary to certify a class if the algorithm is applied across a broad swath of employees).

138. *See* Sonderling & Kelley, *supra* note 40, at 1180. WHD administers and enforces the FLSA with respect to private employment, state and local government employment, and certain federal employees. The U.S. Office of Personnel Management enforces the FLSA for employees of other Executive Branch agencies. *See* U.S. DEP'T OF LAB., HANDY REFERENCE GUIDE TO THE FAIR LABOR STANDARDS ACT (2016), <https://perma.cc/8UQH-K6YY>.

Problematically, the FLSA did not originally define such basic terms as “work” or “workweek,” and the U.S. Supreme Court subsequently interpreted those terms broadly which triggered a flood of litigation.¹³⁹ Responding to this perceived emergency, Congress amended the FLSA in 1947 via the Portal-to-Portal Act to narrow and exclude certain activities from compensable work. Specifically, Congress excluded most commutes to and from work sites, including “walking, riding, or traveling to and from the actual place of performance of the principal activity or activities” as well as “activities which are preliminary and postliminary to said principal activity or activities.”¹⁴⁰

B. Off-the-Clock Work

Even though AI continues to provide tools that, when correctly and lawfully applied, may make certain workplaces more productive, these tools also expose employers to potential liability for “off-the-clock” work performed by non-exempt employees.¹⁴¹ For example, work may be compensable if a non-exempt employee reviews and responds to work communications or revises a document before or after his or her normal work hours.¹⁴² A crucial element in establishing a minimum wage or overtime claim is proving that the employer knew or should have known that the non-exempt employee was performing work.¹⁴³ Some courts have found that the employer must pay even if the employer did not request the work, did not want the work done and even had a policy against doing the work, and even if the employee fails to report their overtime hours.¹⁴⁴ In the case of workplace AI, the tool or device itself will often provide a record that the work was completed after scheduled work hours.¹⁴⁵

The interplay of AI and wage and hour law raises certain FLSA exceptions. Most notably, courts have long recognized and applied an exception to the FLSA known as the *de minimis* doctrine which excuses employers from compensating employees for insubstantial amounts of time spent on off-the-clock work activities, such as logging onto a computer and passing through a security check.¹⁴⁶ The Supreme Court has emphasized that the workweek contemplated by FLSA

139. See Sonderling & Kelley, *supra* note 40, at 1181.

140. 29 U.S.C. § 254.

141. See Schess, *supra* note 17, at 438; Deubert, *supra* note 21, at 2.

142. See Schess, *supra* note 17, at 438; Deubert, *supra* note 21, at 2.

143. See 29 C.F.R. §§ 785.11-13 (2022); see also U.S. DEP’T OF LAB., FIELD ASSISTANCE BULLETIN No. 2020-5 (2020), <https://perma.cc/86MN-6BH7>.

144. See Schess, *supra* note 17, at 439; Chao v. Gotham Registry, Inc., 514 F.3d 280, 288 (2d Cir. 2008); Allen v. City of Chicago, 865 F.3d 936, 938 (7th Cir. 2017).

145. See Allen v. City of Chicago, No. 10 C 3183, 2011 WL 941383, at *6 (N.D. Ill. Mar. 15, 2011) (holding that plaintiff adequately pled that he worked in excess of the time expected by the employer because he “‘routinely and regularly’ responded to phone calls, emails, and work orders” while off the clock).

146. See Carly Baratt, *Time Is Money: A Quick Wage-Hour Tip on . . . the De Minimis Principle*, 10 NAT’L L. REV. (Apr. 20, 2020), <https://perma.cc/FGJ5-2CRB>.

must be computed “in light of the realities of the industrial world” and that “when the matter in issue concerns only a few seconds or minutes of work beyond the scheduled working hours, such trifles may be disregarded.”¹⁴⁷ DOL has codified the de minimis doctrine, recognizing that the amount of time spent on certain pre-shift and post-shift activities varies widely and that employers face difficulty when burdened with the task of monitoring such off-the-clock work.¹⁴⁸

Federal courts usually examine three factors to determine whether otherwise compensable time should be considered de minimis, including: the practical difficulty the employer faces with recording the additional time; the total amount of compensable time; and the regularity of the additional work.¹⁴⁹ Even though there is no bright-line rule as to how much time is de minimis versus compensable, courts have routinely found that periods of about ten minutes of working time is de minimis and therefore not compensable.¹⁵⁰ As a result, an employee who occasionally sends a few work-related emails after ordinary working hours and spends only a minute or two reading or acknowledging an email may not be entitled to compensation under the de minimis rule depending on the circumstances, including the frequency and extent of the so-called de minimis work.

C. Continuous Workday

Another area where AI can result in unforeseen wage and hour exposure involves DOL’s continuous workday principle which provides that the period between the start and finish on the same workday of an employee’s principal activity or activities is considered compensable.¹⁵¹ As a general rule, an employee is not considered to be on duty and the continuous workday does not begin until the employee has performed his or her first principal work activity of the day. The first principal activity is the first task that is integral and indispensable to the duties that the employee was hired to perform.¹⁵² Any non-compensable

147. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 692 (1946).

148. *See* 29 C.F.R. § 785.47 (2022) (“[I]nsubstantial or insignificant periods of time beyond the scheduled working hours, which cannot as a practical administrative matter be precisely recorded for payroll purposes, may be disregarded. . . . [S]uch trifles are de minimis.”).

149. *See, e.g., Peterson v. Nelnet Diversified Sols., LLC*, 15 F.4th 1033, 1042-43 (10th Cir. 2021); *Singh v. City of New York*, 524 F.3d 361, 371 (2d Cir. 2008).

150. *See, e.g., Singh*, 524 F.3d at 371-72 (finding additional commuting time of ten minutes was de minimis and that the time was administratively difficult to record and occurred sporadically).

151. 29 C.F.R. § 790.6 (2022); *Integrity Staffing Sols., Inc. v. Busk*, 574 U.S. 27, 33 (2014). Under *Busk*, “whether an activity is integral and indispensable to an employee’s principal activities does not turn on whether the activity benefits the employer or whether the employer requires the activity.” *Bridges v. Empire Scaffold, LLC*, 875 F.3d 222, 227 (5th Cir. 2017).

152. *Id.* at 227. Many courts apply the integral and indispensable test to all time outside regular work, including both “standby” time and time spent commuting to work. *See id.; see also Pittard v. Red River Oilfield Servs., LLC*, No. 4:15-CV-3753, 2017 WL 6498336, at *2-3 (S.D. Tex. 2017).

activities undertaken during the continuous workday are compensable under the FLSA. However, the continuous workday rule has several exceptions, including bona fide meal and rest periods, or other periods in which an employee is completely relieved of job duties such that they can use time effectively for their own purposes.¹⁵³

D. State Wage and Hour Laws

In addition to the FLSA, employers may be subject to the wage and hour laws of various states or localities. Generally, the law of the state or locality in which work is performed governs the employer's wage and hour obligations with respect to a particular employee. Importantly, many state and local jurisdictions have stricter requirements than those found in the FLSA.¹⁵⁴ For example, states often set additional elements for exemptions from state law wage and hour requirements as well as additional requirements for other aspects of wage and hour law, including unpaid leave and break time and maximum hours.¹⁵⁵ As a result, employers can still be found to be in violation of state and local wage and hour laws even when in compliance with the FLSA. In addition, state wage and hour laws often have a greater territorial reach, such as California's wage and hour law that purports to cover "all individuals regardless of immigration status who have applied for employment, or who are or who have been employed, in this state."¹⁵⁶

III. AI AND WAGE AND HOUR LAW RISKS

Despite the numerous and undeniable benefits of AI in the workplace, employers necessarily take on certain wage and hour risks when they use these technologies. The predominant risk of incorporating AI is the potential that it will not account for hours worked and, therefore, result in underpayment of employees. This Part provides a brief overview of some of the most significant legal risks associated with applying AI in the wage and hour law context. As a threshold matter, it is important to stress that the technologies continue to evolve, which makes predicting scenarios and outcomes particularly challenging. Fully exploring every conceivable legal risk and applicable law or regulation is beyond the scope of this Article, but a general discussion and some key examples are both illustrative and illuminating.

153. 29 C.F.R. § 785.16(a) (2022).

154. See Elizabeth Tippet, Charlotte S. Alexander & Zev J. Eigen, *When Timekeeping Software Undermines Compliance*, 19 YALE J. L. & TECH. 1, 10-14 (2017) (discussing additional requirements of state wage and hour laws).

155. See *id.* at 10.

156. CAL. LAB. CODE § 1171.5(a) (West 2023).

A. On-Call Time

Many companies have relied on AI tools and AI-driven software to manage staffing levels in a manner more finely tuned to changing demand, including having employees as being “on-call” or “on standby” and thus ready to work as needed.¹⁵⁷ Historically, most employees who were “on-call” had to wait at home until they received a communication to report to work.¹⁵⁸ However, where many employees are able to perform work remotely, while “on-call” they have greater freedom to engage in personal activities because they do not need remain close to an employer work site—or their home—provided they have a laptop, tablet, or other devices with them. Instead, if they are needed and contacted by their employer, those employees may work at virtually any location with an internet connection or cellular reception, making risks more acute. AI-based scheduling has increased the use of short-notice scheduling, including the use of on-call shifts, in which workers must be available to work a shift on short notice.¹⁵⁹ Further, if companies use algorithmic scheduling but do not accurately predict consumer demand, these companies may end up scheduling too many workers, thus resulting in significant downtime or the increased use of on-call or waiting time. Beyond scheduling, AI-powered technologies, such that those that enable remote operations, will allow a broader swath of jobs that currently involve substantial downtime to be performed by employees working remotely on an as-needed basis.¹⁶⁰ For instance, AI-powered predictive routing, scheduling, and tools that substantially improve productivity such as ChatGPT may also lead to more downtime and on-call time. Overall, these scenarios might considerably reduce the amount of compensable time worked by eliminating an employer’s obligation to pay their employees for downtime formerly spent at the workplace.¹⁶¹ Going forward, it will become increasingly important to address the question of whether an employee who is not at work but is “on-call” by an employer is entitled to be paid for the time they are on-call.

Traditionally, whether employees must be compensated for on-call time depends on whether an employee is “engaged to wait” or “waiting to be engaged,” or, in the alternative, whether the “on-call time is spent predominantly for the benefit of the employer or the employee.”¹⁶² WHD’s regulations state that an employee who is required to remain on-call on the employer’s premises or so close that the employee cannot use the time effectively for personal activities is still working while they are on-call.¹⁶³ In other words, the focus of the inquiry is whether the time is spent predominantly for the employer’s benefit. In contrast,

157. See Brecher & Magnus, *supra* note 1, at 8.

158. See Schess, *supra* note 17, at 441-42.

159. See Moradi & Levy, *supra* note 68, at 7.

160. See MATHIASON ET AL., *supra* note 35, at 15.

161. *Id.*

162. *Pabst v. Oklahoma Gas & Elec. Co.*, 228 F.3d 1128, 1132 (10th Cir. 2000).

163. 29 C.F.R. § 785.17 (2022).

an employee who is not required to remain on the employer's premises, but is simply required to let the employer know where they may be reached is not working while on-call.¹⁶⁴ The FLSA does not explicitly address the issue of on-call time and courts have reached divergent opinions with the question of whether on-call time is compensable.¹⁶⁵ For example, courts have concluded that employees' on-call duties requiring them "to continually monitor automated alarms by pager and computer" and thus remain at or near their homes were "sufficiently onerous" and therefore compensable under the FLSA.¹⁶⁶ However, courts usually do not find that merely requiring an employee to return a communication during a certain period requires an employer to compensate the worker for the time.¹⁶⁷ Again, courts usually focus on whether employers place restrictive requirements on their employees during on-call time.¹⁶⁸ If they do, employers could be exposed to wage and hour claims under federal and state law.

B. Breaks

The use of AI for wage and hour purposes also exposes employers to liability for certain breaks that non-exempt employees may take. Bona fide meal breaks and other "off duty" time are the two primary exceptions to the continuous workday rule and DOL's regulation states that the employees must be completely relieved from duty.¹⁶⁹ Most courts use a "predominant benefit" test to determine compensability which focuses on whether the break predominantly benefits the employer or employees.¹⁷⁰ Generally, breaks from work lasting five to 20 minutes are common in most industries to promote the efficiency of the employee, and therefore, ultimately benefit the employer. As a result, they must generally be compensated if they occur throughout the course of a single workday.¹⁷¹ Some courts have found that short employee breaks for personal telephone calls and cigarettes "are commonplace and sensible in any working environment" and therefore are compensable work time.¹⁷² The general rule for meal

164. Schess, *supra* note 17, at 441 n.28.

165. *Id.* at 441 n.26-28; *Pabst*, 228 F.3d at 1132.

166. *Id.* at 1130.

167. *See* MATHIASON ET AL., *supra* note 35, at 15.

168. *Id.* at 15-16.

169. *See* 29 C.F.R. § 785.19 (2022) (meal breaks); 29 C.F.R. § 785.16 (2022) (off-duty time).

170. *See* Brecher & Magnus, *supra* note 1, at 11 (explaining that under the predominant benefit test, courts examine the meal period as a whole to determine whether it predominantly benefits the employer or employee).

171. *See* 29 C.F.R. § 785.18 (2023); *see* *Perez v. Am. Future Sys., Inc.*, No. CV 12-6171, 2015 WL 8973055, at *8 (E.D. Pa., 2015) (explaining that courts generally find that work breaks approximately 20 minutes or less should be compensated if taken during a continuous workday).

172. *See, e.g.,* *Reich v. Cole Enters.*, 901 F. Supp. 255, 260 (S.D. Ohio 1993) (concluding that cigarette breaks taken by employees are compensable under § 785.18).

breaks is that periods of at least thirty minutes in duration may be excluded from “hours worked,” and therefore unpaid, if employees are completely relieved of duty for the purpose of eating a meal.¹⁷³

Employers should be especially aware of the liability risks that are created with interrupted breaks, especially meal periods. The risks are increasingly apparent with newer technologies and the rapid growth of remote work. Practitioners note that employees can later rely on emails that were sent or phone calls that were made during their meal period as evidence that they did not receive an uninterrupted meal period.¹⁷⁴ For instance, if an employee clocks out for lunch at a certain period, but the employee’s email history and phone logs show that the employee sent emails or made work-related calls for twenty minutes during that period, the meal break may be compensable.¹⁷⁵

Other than interrupted breaks, automatic deductions may also present some similar compliance challenges. Other than interrupted breaks, automatic deductions may also present some similar compliance challenges. Automatic meal and break deductions are often a preferred default setting for employer timekeeping software that enables them to automatically deduct unpaid meal or other break periods from an employee’s hours.¹⁷⁶ For instance, some employers do not require employees to clock in and out for lunch, but instead deduct 30 or 60 minutes for any given lunch period automatically.¹⁷⁷ While automatic meal and break deduction systems are permitted under the FLSA, the automatic meal or break deductions must accurately reflect any breaks taken.¹⁷⁸ DOL has stressed that when companies choose to utilize an automatic 30 minute deduction “the employer must ensure that the employees are receiving the full meal break.”¹⁷⁹ Automatic deduction cases are often challenging for employers because it is often impossible for an employer to prove that an employee took a break at a certain time. Moreover, software or other scheduling programs that automatically assign breaks even when not taken create enormous liability because of the difficulty of retrospectively removing the break from the system.

Employers using software that monitors employees working in remote locations raises additional break issues. The FLSA requires covered employers to provide reasonable break time for an employee to express breast milk for her nursing child for one year after the child’s birth each time such employee needs to express the milk and a place to express breast milk that is “shielded from view

173. See 29 C.F.R. § 785.19 (2023).

174. See Brecher & Magnus, *supra* note 1, at 14.

175. *Id.*

176. Charlotte S. Alexander & Elizabeth Tippet, *The Hacking of Employment Law*, 82 MO. L. REV. 973, 985 (2017).

177. See Brecher & Magnus, *supra* note 1, at 11-12.

178. *Id.*

179. U.S. DEP’T OF LAB. WAGE & HOUR DIV., FACT SHEET #53—THE HEALTH CARE INDUSTRY AND HOURS WORKED (July 2009), <https://perma.cc/J8CM-JT2Z> (citing 29 C.F.R. § 785.19 (2023)).

and free from intrusion from coworkers and the public” and is not a bathroom.¹⁸⁰ Even though employers are not required to pay employees for milk expression breaks, liability can arise if the break is interrupted, if tracking software does not account for work done while a nursing mother is pumping, if time spent expressing milk is labeled unproductive (inefficient, or non-work) time, or if the employer does not provide a place to express breast milk that is shielded from view. One illustration is if the employer’s monitoring software gives the nursing mother a negative score for productivity during the break, liability issues may also arise if there are lost wages, which some courts have read broadly. For instance, in *Poague v. Huntsville Wholesale Furniture*, the court found that the plaintiff had alleged sufficient damages under the FLSA because she missed out on sales she could have made at work.¹⁸¹ The court explained that she was not provided a place to express her milk at work and therefore had to leave work to express her milk and turn sales over to her colleagues, consequently missing out on those potential commissions.¹⁸² The use of monitoring software can also trigger liability if the employer fails to provide an appropriate place for an employee to pump breast milk that is “shielded from view”, including if they are working at offsite locations such as client sites. In 2023, WHD issued guidance specifying that this requirement includes ensuring that employees are “free from observation by any employer provided or required video system, including a computer camera, security camera, or web conferencing platform, when they are expressing breast milk regardless of the location they are working from.”¹⁸³

C. Timekeeping

The use of advanced timekeeping and monitoring employees raises wage and hour compliance issues as well. Critics argue that some advanced timekeeping and monitoring systems are inept at documenting offline activity and are not reliable with assessing certain work-related tasks.¹⁸⁴ Even though AI-driven software allows employers to monitor and record when employees login and logout, employers may face FLSA exposure if the software fails to account for all time worked, including offline tasks.¹⁸⁵ Most notably, AI-powered monitoring software can potentially fail to fully account for the time employees spend working away from their workstation, offline time spent thinking, strategizing, or resolving problems, time employees spend reviewing and researching hard copy documents, taking handwritten notes, or any offscreen engagement with clients or

180. 29 U.S.C. § 207(r)(1).

181. *Poague v. Huntsville Wholesale Furniture*, 369 F. Supp. 3d 1180, 1198-99 (N.D. Ala. 2019).

182. *Id.* at 1199.

183. U.S. DEP’T OF LAB. WAGE & HOUR DIV., FIELD ASSISTANCE BULLETIN NO. 2023-1 (Feb. 9, 2023), <https://perma.cc/5S3C-C4YG>.

184. See Kantor & Sundaram, *supra* note 58.

185. Schess, *supra* note 17, at 438.

patients.¹⁸⁶ In some occupations, such work may constitute a significant part of the employees' workday—and much of it is likely to be missed by AI devices that count action as work and the absence of keystrokes, for example, as non-work. As a result, employees may end up doing additional online tasks that exceed the 40 hours their employer expects them to work. When combined with any unentered offline work, this additional work can result in a situation in which an employee is working more than 40 hours a week, which is likely to entitle the employee to overtime compensation if he or she is non-exempt.

Employers that rely on monitoring software to determine pay are at greater risks of liability. Commentators have explained that employers' use of monitoring technology that improperly docks pay for non-exempt employees "raises a huge issue as to docking employees for time spent actually working."¹⁸⁷ Practitioners also caution that even though the software often allows employees to manually enter any offline work that was done, doing so is ordinarily frustrating and unduly burdensome.¹⁸⁸ Often, employees neglect or forget to record such time. And as the law places the burden on the employer to accurately record all hours worked, those failures to record work time result in unpaid wages for which employers are liable.

The use of monitoring software to measure compensable time has already generated litigation as recently as 2021. In *Kraemer v. Crossover Market, LLC*, a plaintiff brought a putative FLSA collective action for unpaid off-the-clock work against her former employer and a company that operates a recruitment platform to hire and manage workers.¹⁸⁹ The complaint alleged that the defendants required the plaintiff, an independent contractor who worked remotely, to install tracking software and she was compensated based on the software's tracking of her activities. The plaintiff claimed that the system failed to account for various offline work, including reviewing and annotating hard copy documents, receiving work-related phone calls away from her computer webcam, and participating in Zoom conferences on her mobile phone away from her workstation.¹⁹⁰ In sum, the complaint alleged that the "spyware software would not give credit for Plaintiff's work when it did not detect her sitting in front of the computer, keystrokes on her keyboard or movement of her mouse." The defendants denied the off-the-clock allegations and asserted that the plaintiff was fully compensated for all hours worked. The defendants argued that even if they failed to pay the plaintiff and any putative class members overtime pay for certain activities, the plaintiff and any class members would not be entitled to additional

186. See Deubert, *supra* note 21.

187. Hyman, *supra* note 58.

188. See Deubert, *supra* note 21.

189. *Kraemer v. Crossover Market, LLC*, 1:21-cv-00398-LY (W.D. Tex.); Ward, *supra* note 85.

190. Ward, *supra* note 85.

pay for such time because it was *de minimis*.¹⁹¹ The parties settled for an undisclosed amount several months after the lawsuit was filed.¹⁹² A practitioner explained that the case underscores a practical lesson for managing remote workers: “there can be a problematic disconnect between what surveillance software is capable of measuring and the actual range of tasks an employee regularly performs in the course of carrying out their job duties, particularly where ‘offline’ activities are involved.”¹⁹³

Another potential area of liability with the use of AI-driven timekeeping tools is the use of rounding. A significant number of employers use payroll software that utilizes a formula for rounding off employee clock-in and clock-out times.¹⁹⁴ WHD has long acknowledged that it is common and acceptable for employers to round time in determining an employee’s hours worked provided that doing so will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked.¹⁹⁵ Generally, employers are allowed to round to the nearest five minutes, one-tenth of an hour, one-quarter of an hour, or one-half hour as long as the rounding averages out so that the employees are compensated for all the time they actually work.¹⁹⁶ Obviously, the greater the potential “rounding,” the greater the risk of unpaid wages. And where employers intentionally manipulate schedules or other controls, or intervene to maximize downward rounding, courts are likely to disallow those employers’ use of rounding. Indeed, scholars argue that timekeeping software may in some cases undermine wage and hour compliance because default settings can oftentimes undercount hours and employers sometimes edit down the hours worked.¹⁹⁷

Time recordkeeping will continue to be an issue. Practitioners have also cautioned that there are inherent risks with the use of parallel recordkeeping devices (*i.e.*, if an employer and employee are using different timekeeping systems) that might inadvertently create wage and hour disputes.¹⁹⁸ Others suggest that “employers should remind workers to report any discrepancies between their records and the employer’s so that any mistakes can be corrected promptly”, recognizing that accurate records remain the employer’s legal responsibility even though often only the employee can provide an accurate account of work performed.¹⁹⁹ WHD’s regulations state that minor differences between the clock records and actual hours worked cannot ordinarily be avoided, but major discrepancies raise

191. *Id.*

192. *See id.*

193. *Id.*

194. *See Brecher & Magnus, supra* note 1, at 10-11.

195. 29 C.F.R. § 785.48(b) (2023); *see also* Sonderling & Kelley, *supra* note 40, at 1214-

15.

196. 29 C.F.R. § 785.48 (2023).

197. *See Rogers, supra* note 3, at 566.

198. *See Tornone, supra* note 66.

199. *Id.*

doubts as to the accuracy of the records of the hours actually worked.²⁰⁰ The increased use of telecommuting and remote work also triggers FLSA recordkeeping challenges for employers.²⁰¹ As noted, an employer is required to maintain accurate records of hours worked regardless of where the work is performed.²⁰² The fact that AI and other workplace technologies increasingly enable employees to work remotely and perform work in different states and even countries will make the issue more relevant in the future.

As with many of the newer technologies, timekeeping technologies will result in suits that will become more difficult for employers to defend with AI technology that can accurately account for work time at a granular level, including down to the millisecond.²⁰³ As such, the *de minimis* doctrine and the use of traditional practices such as rounding will not be nearly as effective defenses as they were historically when the “industrial realities” of the traditional workplace made precise time tracking impractical.²⁰⁴ Additionally, an employer cannot cite any timekeeping software malfunctions as a defense to an FLSA lawsuit because the employer is ultimately responsible for maintaining accurate time records and software.²⁰⁵

D. Worker Coverage, Classification, and Exemptions

AI has undoubtedly influenced the coverage and classification of workers. For example, some AI vendors offer AI tools for “[f]aster and accurate classification of employees for payroll calculation.”²⁰⁶ In recent years, the explosive growth of online platforms such as Uber has raised questions about whether individuals who contract to perform services for such companies are statutory employees or independent contractors not covered by the FLSA.²⁰⁷ Critics allege that AI tools increasingly allow companies to “monitor and control workers, while still maintaining a formal arms-length relationship that skirts federal employment status guidelines.”²⁰⁸ By monitoring and surveilling workers, these critics allege that employers are increasingly requiring employees to strictly adhere

200. 29 C.F.R. § 785.48(a) (2023).

201. See Schess, *supra* note 17, at 442-43.

202. 29 U.S.C. § 211(c); 29 C.F.R. § 516.2(a) (2023).

203. See Tippet et al., *supra* note 154 at 60.

204. See *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 692 (1946) (noting that “[t]he workweek contemplated by [the FLSA] must be computed in light of the realities of the industrial world”).

205. See Max Kutner, *Kroger Wage Cases Highlight Timekeeping Platform Issues*, LAW360 (Feb. 2, 2023), <https://perma.cc/Y882-3U38>.

206. See Kugasia, *supra* note 52.

207. See Rogers, *supra* note 3, at 571 (“Uber uses algorithms to manage an enormous and constantly changing workforce with almost no direct human supervision.”).

208. Deming, *supra* note 5.

to protocols and data entry requirements that may effectively minimize the discretion and authority of their employees.²⁰⁹

The FLSA applies only to “employees,” not independent contractors who are engaged for limited purposes to perform a job or service.²¹⁰ This distinction is vital because an employer’s minimum wage and overtime obligations only apply vis-à-vis the workers they employ; equally important, a business can only face wage and hour liability if they are classified as a statutory employer.²¹¹ When evaluating whether a worker is an employee or independent contractor under the FLSA, courts have traditionally applied what is known as the “economic realities” test that evaluates all relevant facts and circumstances of the relationship between a worker and the individual or entity engaging the worker.²¹² The elements of the test vary slightly among the circuits but courts generally analyze independent contractor status by analyzing certain factors on a non-exclusive basis, including the degree of control exercised by the putative employer over the alleged employee.²¹³

Practitioners have stressed that questions concerning whether an individual is properly classified as an employee or independent contractor in the AI context will be decided on a case-by-case basis and will likely hinge on the precise terms and conditions of the particular working arrangement at issue.²¹⁴ Critics of AI used for employment purposes contend that because AI gives employers more power and control over workers there are serious misclassification risks.²¹⁵ Critics cite AI giving employers more power by pricing trips and predicting the best routes as examples of how these technologies give employers much more control over workers.²¹⁶ However, several of these criticisms miss the mark. Where the technology provides workers with tools and devices that do not require certain actions but instead allow workers to make decisions based on more information, such AI actually provides workers with increased control over their schedules and grants more flexibility and independence, thus favoring independent contractor status for such workers.²¹⁷ For instance, algorithmic scheduling enables

209. See generally *id.*

210. *Franze v. Bimbo Foods Bakeries Distrib., LLC*, No. 17-CV-3556(NSR), 2019 WL 2866168, at *5 (S.D.N.Y. July 2, 2019), *aff’d sub nom.* *Franze v. Bimbo Bakeries USA, Inc.*, 826 F. App’x 74 (2d Cir. 2020).

211. *Id.*; see also Hirsch, *Future Work*, *supra* note 24, at 924.

212. See *Coal. for Workforce Innovation v. Walsh*, No. 1:21-CV-130, 2022 WL 1073346, at *13-14 (E.D. Tex. Mar. 14, 2022).

213. *Id.* (discussing the various factors courts used to determine whether a worker is an employee or independent contractor). Other factors include the worker’s opportunity for profit or loss and his or her investment in the business; the degree of skill required to perform the work; the permanence of the working relationship; and the extent to which the work is an integral part of the employer’s business. *Id.* No single factor is dispositive, and the determination turns on a holistic assessment of the totality of the circumstances. *Id.*

214. See *MATHIASON ET AL.*, *supra* note 35, at 14.

215. See Deming, *supra* note 5; Hirsch, *Future Work*, *supra* note 24, at 924-25.

216. See Deming, *supra* note 5.

217. See generally Miriam A. Cherry, *Working for (Virtually) Minimum Wage: Applying*

workers to specify times that they would ideally like to work, thus giving them much more flexibility in their work schedules.²¹⁸ Admittedly, this may not be the case for all positions but seems to be the case for a majority of positions. Most independent contractors enjoy substantial flexibility with controlling their own working hours and the way they conduct their jobs, especially since there is usually not a physical or permanent workplace, so it is unsurprising that these jobs involve varying terms and conditions of employment.²¹⁹ Likewise, the nature of remote work may give workers more freedom to control the logistics of when and where they work, and thus reinforces the point that businesses contracting such workers exercise relatively little control.²²⁰ Critics respond that because the crux of the traditional definition of an employee typically centers on the issue of employer control, such worker flexibility is not often adequately considered as part of the economic reality test.²²¹ However, courts have widely held that detailed instructions, quality controls, and close monitoring are key components in many independent contractor relationships.²²² Plus, companies are using AI to modify and motivate worker behavior precisely because they cannot control these workers directly. Scholars have also noted that if workers are required to supply their own avatars, computer equipment, and internet connections this leans toward classifying them as independent contractors.²²³

The impact of AI on worker classification will become more relevant in the future since there is evidence that federal regulators are increasingly likely to scrutinize the influence of AI on independent contractor classification. Most notably, in 2022, the Federal Trade Commission and the National Labor Relations Board (NLRB) signed a memorandum of understanding regarding information sharing, cross-agency training, and outreach in areas of common regulatory interest, focusing on the “gig economy.”²²⁴ One area of interest identified by the memorandum raises novel enforcement issues as applied to independent contractors: “the impact of algorithmic decision-making on workers.”²²⁵ The agreement suggests that companies being investigated by either agency should expect that

the Fair Labor Standards Act in Cyberspace, 60 ALA. L. REV. 1077, 1098 (2009).

218. See Rogers, *supra* note 3, at 565-66.

219. See Jeffrey M. Hirsch & Joseph A. Seiner, *A Modern Union for the Modern Economy*, 86 FORDHAM L. REV. 1727, 1744 (2018).

220. See *id.*; MATHIASON ET AL., *supra* note 35, at 15.

221. Hirsch & Seiner, *supra* note 219, at 1744.

222. See, e.g., *Lepkowski v. Telatron Mktg. Grp.*, 766 F. Supp. 2d 572, 579 (W.D. Pa. 2011) (explaining that courts have frequently held detailed instructions and strict quality control will not on its own indicate an employment relationship); *Jacobson v. Comcast Corp.*, 740 F. Supp. 2d 683, 690 (D. Md. 2010).

223. Cherry, *supra* note 217, at 1098.

224. See *Memorandum of Understanding Between the Federal Trade Commission (FTC) and the National Labor Relations Board (NLRB) Regarding Information Sharing, Cross-Agency Training, and Outreach in Areas of Common Regulatory Interest*, <https://perma.cc/AY4G-DUQG> [hereinafter *FTC-NLRB Memorandum of Understanding*].

225. *Id.*

its practices may be scrutinized by both.²²⁶ Earlier in the year, WHD and the NLRB announced a memorandum of understanding that placed a comparably strong emphasis on worker classification, but the memorandum did not include any mention of algorithmic decision-making.²²⁷

Ultimately, the distinction between employee and independent contractor will continue to be a threshold issue for the application of wage and hour laws for the foreseeable future. As a result, the effect of AI and robotics on workers' coverage and classifications will be an important issue. Many states have established their own tests for evaluating independent contractor status, and states like California and New Jersey make it considerably more difficult to establish such status.²²⁸

The impact of AI is not limited to independent contractors but might also affect workers who are currently exempt from the FLSA's protections. Under the FLSA, employees may be exempt from minimum wage and overtime protections under the "white collar" exemptions, including employees working in an executive, administrative, or a professional capacity.²²⁹ In addition to meeting specific compensation requirements, employees generally must meet certain tests regarding their job duties.²³⁰ For instance, to qualify for the creative professional employee exemption, the employee's primary duty must be the performance of work requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor.²³¹ Another example is the professional exemption whereby the employee's primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment.²³² Similarly, the administrative employee exemption requires that an employee's primary duty involves "the exercise of discretion and independent judgment with respect to matters of significance."²³³

The use of AI and algorithmic technologies may fundamentally alter workers' primary duties, causing currently exempt employees to lose their exempt status. Many positions that once satisfied the "exercise of discretion" and "judgment" tests may no longer satisfy the professional or administrative exemptions

226. See Marc Antonetti, Ann O'Brien & Daniel Kaufman, *Prepare For NLRB Collaboration With Antitrust Agencies*, LAW360 (Aug. 19, 2022), <https://perma.cc/J679-BKFJ>.

227. See *Memorandum of Understanding Between the U.S. Department of Labor, Wage and Hour Division and the National Labor Relations Board*, DEP'T OF LAB. (Dec. 8, 2021), <https://perma.cc/DZ86-KZ8A> [hereinafter *DOL-NLRB Memorandum of Understanding*].

228. See Daniela Porat, *How States & Cities Are Surpassing the DOL's Contractor Test*, LAW360 (Oct. 21, 2022), <https://perma.cc/3SSU-X43M>.

229. See 29 U.S.C. § 213; 29 C.F.R. § 541.0 (2023).

230. *Id.* To qualify for one of these exemptions, an employee must earn a certain amount of money per week on a salary basis, or per year. See *id.* §§ 541.600, 541.601 (2021).

231. *Id.* § 541.302 (2021).

232. *Id.* §§ 541.300-04 (2021).

233. *Id.* § 541.200 (2021).

because AI has replaced the discretion and judgment that was previously exercised by humans.²³⁴ Critically, employers that require employees to adhere to strict AI-driven protocols and data collection may effectively strip employees of some of their discretion and authority and, consequently, could result in employees losing their exempt status under the professional or administrative exemptions.²³⁵ Algorithms that determine routes and AI that allows for the granular management of employees surely reduces their exercise of discretion and judgment, which the professional and administrative exemptions require.²³⁶ Likewise, the use of algorithms to make business decisions and micromanage employees may jeopardize the executive employee exemption which requires an employee's primary duty to be "managing the enterprise."²³⁷

Moreover, if the use of AI results in a creative professional exempt employee doing less work requiring invention, imagination, originality, or talent, an employer would no longer be entitled to exempt the employee under the creative professional employee exemption.²³⁸ Indeed, the erosion of the creative professional exemption is becoming progressively more possible as generative AI programs like ChatGPT and DALL-E enable users to create news reports, musical compositions, books, and artwork.²³⁹ For similar reasons, the learned professional exemption, which requires an employee to engage in work that must be "predominantly intellectual in character", may be in jeopardy.²⁴⁰ Commentators have suggested that the use of AI and workplace surveillance software to track productivity has caused the FLSA exempt status for doctors, social workers, chaplains, and even lawyers to now be in question.²⁴¹

The FLSA exemptions for doctors and attorneys will likely be significantly impacted by AI. The FLSA's provisions do not apply to "[a]ny employee who is the holder of a valid license or certificate permitting the practice of law or medicine or any of their branches and is actually engaged in the practice thereof."²⁴² The fact that AI has been used to diagnosis diseases, review medical charts, track

234. See Brecher & Magnus, *supra* note 1, at 13.

235. See Deubert, *supra* note 21.

236. *Id.*; see also Ward, *supra* note 85 ("As a theoretical matter, an employer's use of monitoring software to micromanage its white-collar employees might be viewed as contrary to the exercise of independent judgment and discretion that is regularly viewed as a sine qua non for classifying an employee as 'exempt' from the overtime provisions of the FLSA.")

237. See Deubert, *supra* note 21; 29 C.F.R. §§ 541.100-06 (2019).

238. See Deubert, *supra* note 21.

239. See Erin Griffith & Cade Metz, *A New Area of A.I. Booms, Even Amid the Tech Gloom*, N.Y. TIMES (Jan. 7, 2023), <https://perma.cc/7J4P-75U2> (noting that ChatGPT has been used by millions of users to create everything from poetry to term papers to rewrites of classic songs; also explaining that DALL-E is an AI-driven program that allows users to generate realistic images simply by describing what they want to see).

240. See Deubert, *supra* note 21; 29 C.F.R. § 541.301 (2023).

241. See Ward, *supra* note 85; Kantor & Sundaram, *supra* note 58.

242. 29 C.F.R. § 541.304(a)(1) (2023). The medical exemption applies to "physicians" which is broadly defined in the regulations and includes medical doctors, osteopathic physicians, podiatrists, dentists, and optometrists. 29 C.F.R. § 541.304(b) (2023).

a patient's health, predict therapeutic response, and potentially help provide preventative medicine in the future certainly raises questions about the extent to which doctors are exempt under the FLSA.²⁴³ Similar questions arise for the FLSA's attorney exemption, especially with the explosive growth of generative AI tools like ChatGPT being used for legal research, discovery, and even creating initial drafts of employment agreements, demand letters, and nondisclosure agreements.²⁴⁴

There has already been some early litigation challenging the contours of the FLSA's attorney exemption and machine-led legal tasks. In *Lola v. Skadden*, a former contract attorney filed an FLSA collective action for overtime pay against a law firm for the document review he performed.²⁴⁵ The plaintiff alleged that "he provided services that a machine could have provided" and that the firm's "tight constraints" on his work meant that he exercised no legal judgment whatsoever while performing his job duties.²⁴⁶ The district court dismissed the complaint, concluding that the plaintiff was exempt from FLSA's overtime rules because he was a licensed attorney engaged in the practice of law.²⁴⁷ On appeal, the Second Circuit vacated and remanded the decision, holding that, under the FLSA, "an individual who ... undertakes tasks that could otherwise be performed entirely by a machine cannot be said to engage in the practice of law" and recognized that the lawyer's task of document review may fall under that category.²⁴⁸ Ultimately, AI will mainly allow physicians and attorneys to concentrate on the more complicated, challenging matters rather than administrative tasks but this will surely be tested in the courts.

Another profession that will likely be highly impacted by AI is journalism. WHD's regulations specifically identify journalism as a field whose duties may qualify as a creative professional but journalists do not qualify for the FLSA exemption if they only collect, organize, and record information that is routine or already public, "or if they do not contribute a unique interpretation or analysis to a news product."²⁴⁹ When OpenAI released ChatGPT in late 2022, commentators noted that it presents an existential threat for traditional journalism because the "technology can generate serviceable content with very little input."²⁵⁰

AI may affect employee classifications in other ways as well. Notably, the FLSA's "white collar" exemptions require that an exempt employee receives a

243. See Hodge, *supra* note 7, at 416-17.

244. See Black, *supra* note 27.

245. *Lola v. Skadden*, Arps, Slate, Meagher & Flom LLP, 620 F. App'x 37 (2d Cir. 2015).

246. *Id.* at 45.

247. *Id.*

248. *Id.*

249. See 29 C.F.R. § 541.302(d) (2023).

250. Megan McArdle, *The New AI Writing Tool Might Teach Us the Value of Truth*, WASH. POST (Dec. 7, 2022), <https://perma.cc/2FMA-GS2J>.

salary.²⁵¹ If AI is used to monitor employees and docks employees for times of perceived inactivity, the employer is essentially treating these exempt employees as hourly employees. The general rule under the FLSA is that a salary is earned in its entirety as soon as a salaried employee works one minute during any given work week and their full salary is owed regardless of how many hours the exempt employee works.²⁵² The salary amount cannot be reduced because of variations in the quality or quantity of the work performed. If an employer uses AI-driven tools to dock an exempt employee's salary for any time they did not work—whether actual or perceived—then they are treating that employee as an hourly employee.²⁵³ Because hourly employees are not exempt under the FLSA, paying exempt employees in this manner converts them to non-exempt employees and therefore makes them eligible for the wage and overtime requirements under the Act.²⁵⁴ But this is not limited to the time worked. This would also be the case if AI is used to reduce any pay based on the quality of the work performed since the same principle applies to output measurements.

For these reasons, employees who were once considered exempt from the FLSA may contend that the use of AI tools in the workplace converted their status, and they are therefore no longer exempt, which might entitle them to additional compensation while exposing employers to costly litigation.

E. Joint Employer Status and AI

Like the impact of AI on employee coverage and classification, AI and monitoring technology are simultaneously raising concerns over employer coverage, including arguments that joint employment status has been broadened.²⁵⁵ The joint employer doctrine allows a court to find a joint employer liable for either its own actions or being jointly and severally liable for its actions and those of the other joint employer. Put differently, when businesses are considered “joint employers” with respect to one or more employees, they each share the responsibility for minimum wage and overtime violations under the FLSA regarding their joint employees.²⁵⁶ Even though the FLSA does not expressly use the term

251. 29 C.F.R. § 541.602(a) (2019).

252. *Id.* Being paid on a “salary basis” means that the worker “regularly receive[d] each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee’s compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed.” *Id.*

253. 29 C.F.R. § 541.603 (2023); *Anani v. CVS RX Servs., Inc.*, 788 F. Supp. 2d 55, 64 (E.D.N.Y. 2011) (an employee’s exempt status is lost only “if there is either an actual practice of making [improper] deductions or an employment policy that creates a ‘significant likelihood’ of such deductions”).

254. 29 C.F.R. § 541.603; *see also* Hyman, *supra* note 58.

255. *See* Hirsch, *Joint Employment in the United States*, *supra* note 24, 56-60.

256. *See* Carl H. Petkoff, *Joint Employment Under the FLSA: The Fourth Circuit’s Decision To Be Different*, 70 S.C.L. REV. 1125, 1126 (2019) (discussing the history of the joint employer doctrine).

“joint employer,” courts usually focus on the actual or constructive control the putative joint employer exercises over the employee.²⁵⁷

The increased adoption and use of AI has generated concerns that more businesses may now be considered statutory employers, especially franchisors which have been the longtime favorite targets of WHD enforcement actions and lawsuits when they do not maintain strict separation from the operations of franchisees.²⁵⁸ Scholars contend that algorithmic management and monitoring technologies have substantially increased the level of control that franchisors are able to exert over franchisees and their employees.²⁵⁹ As a consequence, this purported control places franchisors at a much greater risk of being classified as an employer of franchisee employees and therefore liable for wage and hour violations.²⁶⁰ Indeed, scholars have cited monitoring technology which has enhanced franchisors’ “ability to observe the smallest details of a franchisee’s operations and require or incentivize the franchisee to implement certain workplace practices” as evidence of the increased likelihood of finding joint employer status.²⁶¹ But this criticism is flawed for at least three reasons. First, even if AI tools such as monitoring software were provided by a franchisor, each franchisee would have the ability to decide whether to use the tools.²⁶² Second, even if the franchisee did use such tools, the franchisee would still control their use; so the franchisor would not have any direct and immediate control over franchisee employees.²⁶³ Critics fail to show how the franchisor is given any more power or control with these tools, which effectively illustrates why focusing on possible control instead of direct control is so problematic. An apt illustration would be if a franchisor provided automated scheduling software for its franchisees to use. In such a case, the franchisor would not be the entity scheduling the franchisee’s employees for work, the franchisee would still be able to create the schedule best suited for its business, and franchisees would still be able to modify the schedule after it is generated.²⁶⁴ Third, courts have widely held that supervising workers and monitoring worker productivity to ensure compliance with certain quality control efforts does not establish control or reflect a joint employer relationship.²⁶⁵

257. See J. William Manuel & Anne Yuengert, *2nd Circ. Title VII Ruling Guides on Joint Employer Doctrine*, JD SUPRA (Mar. 28, 2022), <https://perma.cc/NGH8-GHSJ>.

258. See Hirsch, *Joint Employment in the United States*, *supra* note 24, at 56-57.

259. See Rogers, *supra* note 3, at 562-63; see also Hirsch, *Joint Employment in the United States*, *supra* note 24, at 56-60.

260. See Hirsch, *Joint Employment in the United States*, *supra* note 24, at 56-60.

261. *Id.* at 56-57.

262. See Letter from Willis Goldsmith, Partner, Jones Day, to Barry J. Kearne, Assoc. Gen. Couns. of the Div. of Advice, NLRB (May 22, 2014), <https://perma.cc/6648-7W8F>.

263. *Id.*

264. *Id.* at 5-7.

265. See, e.g., *Martin v. Sprint United Mgmt. Co.*, 273 F.Supp.3d 404, 427 (S.D.N.Y. 2017) (“That Sprint may have conducted or directed evaluations of field agents, monitoring their productivity and compliance, does not establish control, as such quality control efforts

As with worker classification, there is evidence that federal regulators will increasingly scrutinize the use of AI when it comes to joint employer status. In the 2022 memorandum of understanding between WHD and the NLRB, the agencies emphasized an enforcement focus on joint employment relationships.²⁶⁶

F. Self-Driving Cars and Mobile Workspaces

Companies have continued to invest in the development of cars with varying levels of automation, minimizing the need for a driver or making the vehicle completely responsible for navigation, acceleration, and braking without a human.²⁶⁷ Notably, Morgan Stanley predicts that fully autonomous cars will enable consumers to repurpose their time and work during their commutes.²⁶⁸ In this way, autonomous vehicles could potentially create an entirely new type of workspace for employees and thus present a whole new spectrum of wage and hour issues.

Some practitioners have already noted that the rise of autonomous vehicles may involve employees citing the work they performed while commuting in a driverless vehicle in support of a claim for unpaid hours.²⁶⁹ The time employees spend during their normal commute—*i.e.*, traveling from home to their regular workplace before the beginning of the workday and from the workplace back home at the end of the workday—is not considered work time, and therefore, is not compensable.²⁷⁰ However, the FLSA and regulations did not envision a scenario in which an employee was engaged in meaningful work while commuting. Because compensable travel time constitutes “hours worked” and counts towards the 40-hour per week threshold for overtime under the FLSA, employees may increasingly argue they are entitled to additional pay for such travel time. To make matters more complicated, state and local laws often have more demanding travel pay requirements.

Another consideration regarding vehicles is that the car may become a traveling mobile desk for a growing number of employees. More broadly, cars could

differ from day-to-day control.”); *Zheng v. Liberty Apparel Co. Inc.*, 355 F.3d 61, 75 (2d Cir. 2003) (“[S]upervision with respect to contractual warranties of quality and time of delivery has no bearing on the joint employment inquiry, as such supervision is perfectly consistent with a typical, legitimate, subcontracting arrangement.”).

266. See *DOL-NLRB Memorandum of Understanding*, *supra* note 227.

267. See generally Carlos Ignacio Gutierrez Gaviria, *The Role of Artificial Intelligence in Pushing the Boundaries of U.S. Regulation: A Systematic Review*, 38 SANTA CLARA HIGH TECH. L.J. 123, 186 (2022).

268. MORGAN STANLEY, *AUTONOMOUS VEHICLES* (Aug. 2017), <https://perma.cc/CWQ5-XVB4>.

269. See Brett P. Owens, *The Impact of Autonomous Vehicles and the Ability to Work Remotely*, FISHER PHILLIPS (Aug. 28, 2018), <https://perma.cc/56DW-9NS3>.

270. See 29 U.S.C. § 254(a)(1) (“walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which [an] employee is employed to perform” are not compensable activities); 29 C.F.R. § 785.35 (2023) (“Normal travel from home to work is not worktime.”).

operate as mobile offices that might provide an alternative to the home office. Some of the advantages include reduced overhead and operational costs associated with a traditional physical location as well as the ability to travel to clients.²⁷¹ The car as a mobile workspace is increasingly possible as automakers are using AI to create smart cars.²⁷² The growth of the mobile office may test several FLSA exemptions such as the “outside salesman” exemption, which requires an employee to make sales away from the employer’s place of places of business.²⁷³ Courts have explained that the logic underlying the exemption is that “[a] salesman, to a great extent, works individually” and “[t]here are no restrictions respecting the time he shall work and he can earn as much or as little, within the range of his ability, as his ambition dictates.”²⁷⁴ AI and workplace technologies, especially the use of monitoring, could arguably impose restrictions that cause a previously exempt salesperson to lose the exemption. There may also be questions over whether company vehicles that serve as mobile offices could be considered an employer’s “place of business” under the exemption.

G. Payroll and Scheduling

Using algorithms to assist with payroll, performance management, incentives, promotions, and compensation also raises noteworthy legal concerns. As discussed, employers are increasingly using AI to track performance, determine pay, and to incentivize productivity.²⁷⁵ The use of automated payroll software is especially important because courts have routinely held that an employer cannot use an inefficient payroll system the employer chose as a defense to an FLSA lawsuit.²⁷⁶ This defense will become increasingly unavailable with AI, since vendors are generally not liable for AI tools.

271. See Owens, *supra* note 269.

272. See Rob Enderle, *Mercedes, Nvidia, and Google Are Creating Genuinely Smart Cars With AI*, TECH NEWS WORLD (Feb. 27, 2023), <https://perma.cc/2US6-E9ZV> (noting that Mercedes-Benz is using generative AI to make smart cars that communicate their repair needs and can even report when repairs are poorly performed); see also Owens, *supra* note 269 (contending that the mobile workspace is increasingly possible with automakers like Volvo and BMW incorporating Skype for Business into some of their vehicles).

273. To meet the outside sales exemption, an employee’s primary duty must be “making sales” to or “obtaining orders or contracts for services” from customers (with “sale” including sales work and work performed incidental to and in conjunction with sales/solicitations), and the employee must be “customarily and regularly engaged” in performing that duty “away from the employer’s place or places of business.” 29 C.F.R. §§ 541.500-04 (2023).

274. *Meza v. Intelligent Mexican Mktg., Inc.*, 720 F.3d 577, 581 (5th Cir. 2013).

275. See Bales & Stone, *supra* note 51, at 14; see also Kantor & Sundaram, *supra* note 58 (noting that some companies aim to calibrate pay based on productivity scores).

276. See *Dominici v. Bd. of Educ. of City of Chicago*, 881 F.Supp. 315, 320 (N.D. Ill. 1995) (concluding that “[a]n employer may not set up an inefficient accounting procedure and then claim it is not responsible for timely payment of wages due to its own incompetence.”); *Thomas v. Howard Univ. Hosp.*, 39 F.3d 370, 373 (D.C. Cir. 1994) (“Even if, through no fault of management, the payroll department blundered, the employer still must make the under-compensated employee whole. . . . The mistake, and thus the violation, are the employer’s.”).

The FLSA entitles employees to overtime premium compensation based on their regular rate of pay, which includes all remuneration paid to or on behalf of the employee, in whatever form.²⁷⁷ The regular rate is generally calculated by dividing all compensation paid by or on behalf of the employer to the employee for all work in a work week, less statutory exclusions, divided by the total number of hours the employee worked during the same period for which the remuneration was paid.²⁷⁸ The FLSA includes eight categories of compensation that may be excluded from calculation of the regular rate of pay, but the employer bears the burden of establishing that a form of remuneration properly is excluded from the regular rate of pay. WHD's regulations provide that the regular rate "cannot be left to a declaration by the parties as to what is to be treated as the regular rate for an employee" but must instead be based on the employment contract.²⁷⁹

FLSA plaintiffs frequently sue employers by alleging they are entitled to additional overtime compensation because of an employer's miscalculation of the regular rate, where such miscalculation results in underpayments.²⁸⁰ Whether AI will enable employers to account for the wide range of compensation and benefits in calculating the regular rate of pay, including pay differentials, incentive pay, on-call pay, meal breaks, bonuses, and commissions, remains to be seen. The failure to include all remuneration paid to an employee in the regular rate of pay determination will almost always result in the underpayment of overtime and expose employers to DOL enforcement actions or private lawsuits.

Many of these risks will likely be even more pronounced at the state and local level. For example, a growing number of states and local jurisdictions have predictive scheduling laws that require employers to give employees adequate notice of when they will work so that they can plan for their work shifts.²⁸¹ The question of whether AI-driven scheduling platforms can account for these legal nuances is unknown at this time. Zira, an AI-powered scheduling platform, claims that it complies with federal, state, and local laws by automatically applying "preset compliance policies to the schedule to help [a company] stay ahead of the regulations and avoid audits."²⁸² Some scholars have even noted that automated scheduling may ultimately help ensure greater compliance with wage and hour laws.²⁸³

277. See 29 U.S.C. § 207(a)(1).

278. See 29 C.F.R. § 778.109 (2023).

279. 29 C.F.R. § 778.108 (2023).

280. See, e.g., *Howard Univ. Hosp.*, 39 F.3d at 370 (case involving a hospital miscalculating the regular rates of pay of 625 plaintiff-employees).

281. Vanessa K. Manolatos, *Time Is Money: A Quick Wage-Hour Tip on . . . Predictive Scheduling Laws*, EPSTEIN BECKER (Dec. 1, 2020), <https://perma.cc/84A3-YLX3>.

282. Goldstein, *supra* note 74.

283. See Rogers, *supra* note 3, at 566.

H. Wearable Technologies and Robotics: Donning and Doffing Issues

AI, wearable technologies, and robotics pose unique compliance challenges under wage and hour laws. In a nutshell, not paying workers for time spent operating or putting on and taking off—also known as “donning and doffing”—wearable technologies or robotics could potentially expose employers to liability for unpaid wages.²⁸⁴ The standard FLSA rule is that employees must be paid for any time they spend changing and washing clothes that they are required to wear for work.

There are two exceptions under the FLSA that might be at issue moving forward. First, the *de minimis* doctrine will certainly be used by employers to disregard insubstantial amounts of time. Time spent donning and doffing the comparatively small wearable devices that are mainly used for monitoring performance and productivity will likely fall within the *de minimis* exception. However, the larger wearable devices and robotic suits such as exoskeleton and bionic suits aimed at enhancing human performance will be more challenging and are less likely to fall within the exemption, but this may change in the long term as the technologies improve and become less bulky.²⁸⁵

There is a second, albeit more narrow, FLSA exception that could exempt employers in certain unionized workplaces from compensating employees for any time spent donning and doffing robotic devices and wearable technologies at the start or end of his or her shift if the compensation is excluded by “the express terms of or by custom or practice under a bona fide collective-bargaining agreement.”²⁸⁶ The Supreme Court has read this exception narrowly and found that it applies only to “clothes.” The definition of “clothes” includes “items that are both designed and used to cover the body and are commonly regarded as articles of dress” and excludes items including safety glasses, earplugs, and respirators.²⁸⁷ Practitioners have explained that the answer to whether robotic devices and other wearable technologies will meet the FLSA’s definition of “clothes” will likely depend on the nature of the device, how commonly worn the devices are, and the amount of time spent donning and doffing the items.²⁸⁸ In the short term, it is unlikely that such devices will qualify as clothes because they are not commonly regarded as articles of dress but this may change in the future as they become more common.²⁸⁹

284. See Ron Brown, *Robots, New Technology, and Industry 4.0 in Changing Workplaces. Impacts on Labor and Employment Laws*, 7 AM. U. BUS. L. REV. 349, 367 (2018).

285. See Lee & Read, *supra* note 126, at 258 (explaining that modern exoskeleton configurations are bulky and are prone to power source issues but are expected to improve in the future).

286. See MATHIASON ET AL., *supra* note 35, at 11 (citing 29 U.S.C. § 203(o)).

287. *Id.* (citing *Sandifer v. U.S. Steel Corp.*, 571 U.S. 220, 227 (2014)).

288. *Id.*

289. *Id.* (“[T]ime spent donning and removing wearable robotics and other technologies will probably be compensable, even in workplaces governed by a collective bargaining agree-

Practitioners have also stressed that another wage and hour consideration is whether the time spent maintaining the wearable technologies and robotics will be compensable.²⁹⁰ To determine whether any maintenance time is compensable courts will analyze if starting and shutting down the devices are “integral and indispensable” to the principal activity of the employees’ employment.²⁹¹ One recent case is illustrative. In 2022, the Ninth Circuit held that the time a group of call center workers spent booting up their computers was compensable time.²⁹² In this case, call center workers alleged they were not paid for time spent booting up their computers before logging on to their employer’s timekeeping system, nor for time spent turning off their computers after logging off. The court concluded that it was “clear” that “turning on or waking up their computers at the beginning of their shifts is integral and indispensable to their principal activities” and therefore compensable.²⁹³ Also notable is that the Ninth Circuit offered “no opinion” on whether booting up computers would be compensable under the FLSA if the employees worked remotely or used their personal computers to perform the duties.²⁹⁴

I. Extraterritorial Concerns

As AI increasingly enables employees to work remotely and perform work in different states and even countries, the question of which laws govern will become more relevant.²⁹⁵ The first concern involves what state law applies when an employee resides in one state but operates AI tools or robots located in another state as part of his or her job. In this case, the employee is likely subject to the law of the state in which he or she actually operates the technology or robot and not necessarily subject to the state law where the specific technology or robot is located.²⁹⁶ With that said, practitioners stress that employers located on state borders should consider the potential wage and hour implications of permitting their employees to work remotely from one state but also split their time by working at the physical location in another state.²⁹⁷

There is a similar concern over what governing law controls when workers located in foreign countries operate technologies or robots that are located within the United States.²⁹⁸ Importantly, the FLSA does “not apply with respect to any

ment that excludes time spent changing and washing clothes, unless the portion of time devoted to donning and doffing the wearable technology makes up only a relatively small portion of the time doing so overall.”).

290. *Id.*

291. *Busk*, 574 U.S. at 36.

292. *Cadena v. Customer Connexx, LLC*, 51 F.4th 831 (9th Cir. 2022).

293. *Id.* at 839.

294. *Id.* at 834 n.1.

295. See *MATHIASON ET AL.*, *supra* note 35, at 13.

296. *Id.* at 14.

297. *Id.*

298. *Id.*

employee whose services during the workweek are performed in a workplace within a foreign country or within territory under the jurisdiction of the United States.”²⁹⁹ The question of whether the FLSA governs the payment of workers located in other countries who operate tools or robots located within the United States remains uncertain.³⁰⁰ Courts have stressed that “the [FLSA] was obviously designed to apply to a United States economy” and applying the law abroad “is usually inconsistent with local conditions of employment, the level of the local economy, the productivity and skills of indigenous workers, and is contrary to the best interest of the United States and the foreign areas.”³⁰¹ Courts have found that employees of American companies are not entitled to U.S. legal protections for minimum wage and overtime if the employees are physically outside of the U.S. and performing work without telepresence technology for the majority of the time.³⁰² However, practitioners have noted that the FLSA’s definition of “workplace” could be in dispute if the tools or robots are both operated and located within the United States.³⁰³ The same concerns arise with the use of remotely operated vehicles and telesurgery. Practitioners have also noted the likelihood that courts addressing this issue may rely on the FLSA’s text and justification for declining coverage to workers permanently based abroad.³⁰⁴

IV. RECOMMENDATIONS FOR WAGE AND HOUR COMPLIANCE

Even though, as of the time of this writing, WHD has not announced that it was developing regulations or other guidance regarding AI and similar workplace technologies, there are signs that this may change in the future. For instance, the memorandum of understanding between the FTC and NLRB identified “the impact of algorithmic decision-making on workers” as an important enforcement issue related to worker classification.³⁰⁵ WHD already has an agreement with the NLRB in place which enables information sharing and successive, if not complementary, enforcement.³⁰⁶ In October 2022, the NLRB’s General Counsel released a memorandum proposing an amorphous burden-shifting

299. 29 U.S.C. § 213(f); *see also* 5 C.F.R. § 551.212 (2023) (providing detailed foreign exemption criteria).

300. *See* MATHIASON ET AL., *supra* note 35, at 14 (noting that the FLSA provision has not been applied to this precise question).

301. *Wright v. Adventures Rolling Cross Country, Inc.*, No. C-12-0982-EMC, 2012 WL 12942824, at *2 (N.D. Cal. May 3, 2012).

302. *See* MATHIASON ET AL., *supra* note 35, at 14; *see also* Sarviss v. Gen. Dynamics Info. Tech., Inc., 663 F. Supp. 2d 883, 891 (C.D. Cal. 2009) (noting that the FLSA “indisputably does not provide a basis for overtime pay while [Plaintiff] was in Pakistan” so “the only question is whether Plaintiff can succeed on his FLSA claims for the time he spent in training in North Carolina and Texas”).

303. *See* MATHIASON ET AL., *supra* note 35, at 14.

304. *Id.*

305. *See* FTC-NLRB Memorandum of Understanding, *supra* note 224.

306. *See* DOL-NLRB Memorandum of Understanding, *supra* note 227.

framework of her own creation, whereby employers using electronic surveillance and automated management technology will be found to have presumptively violated employee rights under the National Labor Relations Act.³⁰⁷ Equally important, the NLRB's General Counsel emphasized that several federal agencies are targeting employers for their use of monitoring technologies and the NLRB will use interagency agreements with the other federal agencies, including DOL, to facilitate coordinated enforcement against employers.

Other agencies within DOL have shown an increased interest in AI. In 2019, the DOL's Office of Federal Contract Compliance Programs ("OFCCP") issued guidance stating that the use of screening devices like games, challenges, and video submissions that use AI algorithms to assess qualifications may trigger obligations under the Uniform Guidelines on Employee Selection Procedures.³⁰⁸ OFCCP's first director in the Biden Administration, who now serves as the deputy assistant for the White House Domestic Policy Council, has written articles in which she emphasizes the need to amend employment laws to address risks associated with algorithms.³⁰⁹ In particular, she has argued that newer workplace technologies such as surveillance and monitoring have disrupted the traditional employment relationship and increased alternative arrangements that are increasingly precarious for workers.³¹⁰ Such outcomes, she argues, require additional or expanded legal protections, especially with independent contractors.³¹¹ The Biden Administration's enforcement focus likewise raises the possibility of future WHD enforcement actions involving the use of AI. Two former WHD administrators have criticized WHD under the Biden Administration's leadership as chiefly engaged in "gotcha" enforcement whereby enforcement priorities and actions are largely secretive and new requirements are imposed without any prior notice.³¹²

As such, companies that use AI for wage and hour purposes should be forward-thinking as they evaluate and address potential risks. WHD should also issue guidance regarding the potential legal risks at stake. Another effective measure that employers and their HR professionals can take to protect themselves against government enforcement actions and litigation is to adopt best

307. See Press Release, Nat'l Lab. Rels. Bd., *NLRB General Counsel Issues Memo on Unlawful Electronic Surveillance and Automated Management Practices* (Oct. 31, 2022), <https://perma.cc/W2T3-SDNJ>.

308. Office of Fed. Cont. Compliance Programs, *Validation of Employee Selection Procedures*, U.S. DEP'T LAB., <https://perma.cc/55WT-K97A> (last updated July 23, 2019). In short, the Uniform Guidelines on Employee Selection Procedures articulates standards for compliance with certain requirements under Title VII. See 29 C.F.R. §§ 1607.5-9 (2023).

309. See Jenny R. Yang, *Adapting Our Anti-Discrimination Laws to Protect Workers' Rights in the Age of Algorithmic Employment Assessments and Evolving Workplace Technology*, 35 ABA J. LAB. & EMP. L. 207, 211 (2021).

310. *Id.* at 231.

311. *Id.* at 236-37.

312. See Cheryl Stanton & Tammy McCutchen, Opinion, *A Return to 'Gotcha' Enforcement*, WASH. TIMES (Mar. 22, 2021), <https://perma.cc/EX4R-MVBJ>.

practices for using AI in the wage and hour context.

This Part offers some recommendations that may help employers comply with wage and hour law, compensate their workers, and reduce the risks associated with AI, diminish uncertainty, protect employees, and not foreclose or limit future AI innovations that may add value for employees, non-employee workers, and employers.

A. Voluntary Compliance Programs

Federal agencies, including WHD, should strongly encourage and incentivize employers to establish voluntary compliance programs that would allow employers to independently ensure that they comply with their legal and ethical obligations. These programs are especially important considering the legal uncertainty when AI is used in the workplace. Perhaps not surprisingly, a growing number of federal agencies have strongly encouraged voluntary compliance programs as an effective means to handle the specific challenges associated with AI.³¹³ Most notably, in 2023, the National Institute of Standards and Technology, an agency within the U.S. Department of Commerce whose mission is to promote American innovation and industrial competitiveness, released a comprehensive Artificial Intelligence Risk Management Framework, which is “a guidance document for voluntary use by organizations designing, developing, deploying or using AI systems to help manage the many risks of AI technologies.”³¹⁴

To help facilitate voluntary compliance programs, WHD should provide defined procedures, methods, and results that, in its opinion, enable companies to comply with wage and hour legal requirements. Moreover, employers should be strongly encouraged and incentivized to audit their algorithms and mitigate any wage and hour-related risks. Employers should be given a degree of protection if they can show that they are seeking in good faith to identify when there are mistakes in their AI-driven HR processes to eliminate or correct for them. Wage and hour law will not achieve its purposes if it arguably gives employers a reason to avoid discovering or otherwise ignore the consequences of their practices.

Fortunately, WHD already has a self-audit program template available with its former Payroll Audit Independent Determination (“PAID”) Program, a self-reporting program that allowed employers to preemptively remedy potential wage and hour issues discovered during a self-audit without incurring penalties and added expense.³¹⁵ The goals of the PAID Program were to resolve claims

313. Keith E. Sonderling & Bradford J. Kelley, *Filling the Void: Artificial Intelligence and Private Initiatives*, 24 N.C. J.L. & TECH. 153, 153 (noting that several federal agencies have encouraged voluntary compliance “to effectively and responsibly harness the benefits of AI”).

314. Press Release, U.S. Dep’t of Com., Nat’l Inst. of Standards & Tech., *NIST Risk Management Framework Aims to Improve Trustworthiness of Artificial Intelligence* (Jan. 26, 2023), <https://perma.cc/3V8S-82HG>.

315. See Sonderling et al., *supra* note 2, at 58-59.

more expeditiously and without litigation, improve employers' compliance, and ensure that more employees received the back wages they were owed with greater expediency.³¹⁶ WHD would then supervise and approve settlement agreements to ensure that employees received the full payment of back wages.³¹⁷ The PAID Program was overwhelmingly successful and was found to benefit both employers and employees. Reports concluded that more workers received the back wages owed in less time compared to traditional WHD investigations. DOL also found that actions brought under PAID required less than half the staffing resources of traditional WHD investigations and resulted in more than ten times the amount of back wages owed per WHD staff hour invested.³¹⁸

Although the Biden Administration's DOL abruptly ended the PAID Program in 2021 even though the program was highly successful, there have been legislative attempts to codify the program.³¹⁹ Specifically, in 2021, U.S. Senator Mike Braun and U.S. Congresswoman Elise Stefanik introduced the Ensuring Workers Get PAID Act to set the program in the law so employers can resolve oversights quickly and stay in compliance with the law.³²⁰ The National Federation of Independent Businesses has strongly supported this legislation, arguing that it would be especially beneficial for small businesses that do not have compliance experts and counsel on their staff unlike larger businesses.³²¹ PAID should serve as a highly resourceful model for mitigating AI-related risks in the wage and hour arena.

B. WHD Guidance

WHD should prioritize issuing guidance to the public regarding AI and workplace technologies. Guidance that clarifies how to tailor and test AI platforms and workplace technologies is especially important for employers and vendors to ensure they comply with wage and hour laws and that they understand possible liability. Updated guidance is also important because many programs already implement WHD guidance, including WHD guidance about automated timekeeping software.³²²

316. *Id.*

317. *Id.* at 59.

318. See Press Release, U.S. Dep't of Lab., *U.S. Department of Labor's PAID Program Helps Workers and Employers as America Reopens* (July 14, 2020), <https://perma.cc/FTY7-NT8S>.

319. *Id.*; see also Press Release, Mike Braun, Senator, U.S. Senate, *Braun and Stefanik Introduce Legislation to Ensure Workers Get Paid* (Oct. 26, 2021), <https://perma.cc/MG8L-42SB>; Ensuring Workers Get PAID Act of 2021, H.R. 5743, 117th Cong. (2021).

320. See Braun, *supra* note 319.

321. See Press Release, Nat'l Fed. of Indep. Bus., *NFIB Supports Federal Legislation to Restart the PAID Compliance Assistance Program* (Feb. 17, 2022), <https://perma.cc/E7GJ-3BRS>.

322. See Susan C. Morse, *Government-to-Robot Enforcement*, 2019 U. ILL. L. REV. 1497, 1515 (2019) (explaining that guidance is used by timekeeping software companies for

One highly effective way that WHD could issue more guidance is by using opinion letters to answer questions regarding the use of AI in the workplace. In a nutshell, an opinion letter is an official written opinion from WHD regarding how a statute, its implementing regulations, and related case law apply to a specific situation presented by the person or entity requesting the opinion.³²³ WHD has issued opinion letters for over seventy years and they have proven to be an instrumental resource for courts, employers, employees, unions, trade groups, practitioners, advocacy groups, and the general public.³²⁴ Opinion letters could be particularly useful with addressing concerns about AI since WHD has long used opinion letters to clarify laws of a certain age such as the FLSA in the modern era. Indeed, WHD has issued several opinion letters specifically addressing AI-related issues ranging from opinion letters on a virtual marketplace company and another on an employer's use of rounding software.³²⁵ Opinion letters have also been highly advantageous by allowing WHD to opine on the scope of FLSA exemptions in light of new developments.³²⁶

Employers, vendors, employees, workers, and others could submit opinion letter requests seeking answers to a wide variety of critical AI questions. In particular, opinion letters could be used to clarify the threshold beyond which the amount of time that an employee dons or doffs wearable technologies and robotics is compensable or to address the level of control AI tools provide regarding worker and employer classification. Because of the nuances of FLSA state laws, state labor and employment agencies should also consider issuing opinion letters to answer critical questions about the use of AI under these state laws. Ultimately, opinion letters give agencies a way to provide valuable guidance without waiting for new statutory authority.

C. Best Practices for Employers

To protect themselves against government enforcement actions and litigation, employers should adopt best practices for using AI with respect to wage and hour purposes. Some scholars contend that best practices that lay out specific guidelines might help also prevent exploitation of workers.³²⁷ The best practices contained in this Section are intended to be a starting point for companies to

rounding purposes).

323. See Sonderling & Kelley, *supra* note 40, at 1175-76 (describing the history of opinion letters and their benefits).

324. *Id.*

325. *Id.* at 1212 (arguing that “[o]pinion letters provide an invaluable way to account for important changes in the modern economy and workforce such as employee use of mobile technology to work remotely and the rise of the gig economy.”).

326. *Id.* at 1216 (discussing a WHD opinion letter finding that highly compensated paralegals were exempt from the FLSA's overtime requirements because of legal developments).

327. Cherry, *supra* note 217, at 1109 (contending that best practices “would be influential if they formed a coherent set of expectations to which both workers and employers could adhere”).

comply with wage and hour laws.

1. Policies Regarding Off-the-Clock Work, Remote Work, and Telecommuting

As AI increasingly enables companies to monitor their employees, employers must still be able to account for any time employees work while they are “off-the-clock.”³²⁸ As such, employers must determine whether non-exempt employees regularly engage in any off-the-clock activities that are not currently being recorded. Critically, employers should create specific policies about any off-the-clock work and require non-exempt employees to report any such work.³²⁹ Some practitioners recommend that employers adopt policies completely prohibiting off-the-clock work and disciplining employees who fail to follow those policies.³³⁰ Practitioners have also emphasized that it is vital that employers have a clear policy with respect to hours worked by non-exempt telecommuters such as specific forms that telecommuters must complete or timesheets.³³¹

Moreover, it is imperative that employers clearly communicate these policies to their employees.³³² Notably, if an employer maintains a general policy of prohibiting employees from working after hours without first receiving approval from management, it is important to communicate that after-hours work requires the same approval. To the extent possible, employers should structure work in a way that employees do not work off-the-clock and limit pre- and post-shift communications with non-exempt employees.³³³ One way to accomplish this is limiting company-provided devices such as smartphones or tablets to exempt employees or configuring an employer’s computer systems so that non-exempt employees cannot access company computer systems or use company property after work hours.³³⁴

Experts also stress the importance of employers specifically instructing their employees to report any off-the-clock work and the employer’s record keeping procedures should be equipped to record such work.³³⁵ This process provides some mechanism for employers to monitor work being performed outside of the ordinary workday. Some practitioners recommend requiring employees to verify each week in writing that they have recorded all time worked, including work completed both inside and outside of the office, as a way to further reduce wage and hour liability.³³⁶ Even if employees later contend that they were instructed

328. See Schess, *supra* note 17, at 438.

329. See Baratt, *supra* note 146.

330. *Id.*; see also Brecher & Magnus, *supra* note 1, at 13-14.

331. Schess, *supra* note 17, at 442-43.

332. *Id.* at 440-41.

333. See Baratt, *supra* note 146.

334. Brecher & Magnus, *supra* note 1, at 13-14.

335. See Schess, *supra* note 17, at 440-41; see also Baratt, *supra* note 146.

336. Brecher & Magnus, *supra* note 1, at 13.

by their supervisor not to record all hours worked despite their verification that all hours were recorded, the employer will be able to show the employee and the supervisor were acting in violation of a company policy.³³⁷

Employers should also select and use appropriate timekeeping software. Some commentators have suggested that it may be best for employers to avoid relying exclusively on monitoring software to track the working hours of non-exempt employees.³³⁸ Before purchasing and implementing such technologies in the workplace, employers should consider exactly how much time the tools will capture and what degree of employee training and involvement is needed for the time to be recorded properly and efficiently. Some commentators have recommended that employers include indemnification provisions in their agreements with the operators of such platforms that specify that the employer is not at fault in the event the platform malfunctions.³³⁹ In addition, employers need to be aware of new technologies and consistently make updates to confirm that their tools accurately record all time worked.

2. On-Call Time and Breaks Policies

Employers using AI to lower payroll costs and other overhead by allowing employees to work remotely and as needed should avoid placing too many restrictions on employees who are on-call. As discussed, placing too many restrictions on on-call employees risks converting their on-call time to compensable work time and could therefore expose employers to claims under federal and state law. To the degree possible, employers should therefore structure remote workers' on-call time to minimize any restrictions on how the employees use the time so they may reduce exposure to liability. Practitioners have also suggested providing employees who are on-call with hourly compensation, but at a lower rate to ensure the time has been compensated.³⁴⁰

Both employees and managers should be instructed that employees must receive an uninterrupted meal period and supervisors should not email, call, or assign tasks to employees while they are on their meal break.³⁴¹ Some practitioners have suggested that employers should also consider prohibiting employees from eating at their workstations so that they are not tempted to respond to phone calls, texts, and emails.³⁴² Moreover, employees who might need to briefly leave their workspace for an unpaid break for a protected reason such as a nursing mother who needs to pump, could be given an opportunity within the tracking software

337. *Id.* (noting that the verification also could include an additional affirmation that no manager has instructed the employees not to record their time and include a specific telephone number to call to report any abuses).

338. See Deubert, *supra* note 21.

339. See Kutner, *supra* note 205.

340. Brecher & Magnus, *supra* note 1, at 14.

341. *Id.*

342. *Id.*

to explain her absence.³⁴³

3. *Wage and Hour Audits*

One way to effectively address any wage and hour risks that may arise by using AI in the workplace is for employers to conduct a wage and hour audit to review a company's wage and hour practices and policies. The unique requirements and nuances of wage and hour laws demand that employers independently verify that each of their policies and practices comply with FLSA requirements. More specifically, employers should review their policies and practices for compliance with wage and hour laws, especially regarding timekeeping, payment of wages, overtime calculations, deductions, uncompensated work periods, meal breaks, and any off-the-clock work.³⁴⁴ Additionally, employers should review their policies and practices to determine whether employees are properly classified as exempt or non-exempt and whether workers are correctly treated as independent contractors. An internal audit also presents an opportunity for employers to review their recordkeeping policies and practices. Another benefit of a wage and hour audit is that it provides a defense to liquidated damages for FLSA claims.³⁴⁵

In most cases, practitioners recommend conducting audits on a fairly regular basis to identify and avoid wage and hour risks before they arise.³⁴⁶ A comprehensive internal audit could be conducted once a year at the beginning or end of a company's fiscal or calendar year. Alternatively, some organizations could conduct internal audits on a more frequent basis since it allows for more regular check-ins for compliance concerns, including employee classifications or overtime calculations for new employees. And employers can also consider combining a comprehensive annual audit with quarterly inspections to be as proactive as possible about potential FLSA exposure.

4. *Vendor Liability Awareness*

In most cases, employers engage with third-party software vendors to implement AI in the workplace. As a result, employers should carefully review and negotiate any contracts they have with third-party vendors providing AI services

343. See Amanda Ottaway, *Productivity-Tracking Pitfalls Employers Should Avoid*, LAW360 (Sept. 1, 2022, 11:19 AM EDT), <https://perma.cc/QQW4-THU9>.

344. See Neil Eddington, Opinion, *A Comprehensive Audit is Crucial for Wage and Hour Compliance*, HR DIVE (Mar. 1, 2022), <https://perma.cc/82CG-PLKV>.

345. See 29 U.S.C. § 260 (“[I]f the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the [FLSA], as amended, the court may, in its sound discretion, award no liquidated damages . . .”).

346. See Courtney Leyes & Marilyn Higdon, *An Ounce of Prevention is Worth a Pound of Cure: How to Conduct an Internal Audit in 7 Steps to Avoid Wage and Hour Misclassification*, FISHER PHILLIPS (June 30, 2021), <https://perma.cc/FZ2J-KT4B>.

in the workplace.³⁴⁷ Furthermore, employers should also ask AI software vendors for information about how they ensure compliance with wage and hour laws. Employers should request a description and analysis of the methods used to calculate the regular rate of pay and overtime compensation for all non-exempt employees. Another useful question is how the software classifies employees as exempt or non-exempt from the wage and hour laws.

5. Awareness of AI Legislation and Developments

Finally, employers should track changes in the law that might affect FLSA compliance. Employers should be aware of changes domestically and internationally since many countries and international organizations are in the process of developing new laws and regulations surrounding the use of AI, robots, and automation in the workplace.³⁴⁸ This is especially important given the FLSA extraterritorial concerns at stake. There is also a need to be aware of developments at federal agencies such as the memorandum of understanding between the NLRB and FTC stating that future enforcement actions will account for the impact of AI on worker classification.³⁴⁹ Overall, a comprehensive understanding of the wage and hour landscape will simultaneously benefit any self-audits that employers perform.

CONCLUSION

Ultimately, the legal issues associated with the use of AI related to wage and hour will continue to evolve as the technologies become more sophisticated, widespread, and embedded in the workplace. Not surprisingly, this legal landscape will continue to change as the legal issues are tested in the courts and examined by federal and state administrative agencies and legislatures. At the end of the day, AI will ultimately help employers comply with wage and hour laws, especially as the tools improve. But the risks cannot be ignored. Looking forward, the use of AI in the workplace will generate more regulatory and legislative responses and enforcement actions. As such, companies need to be forward-thinking and proactive in addressing the likely wage and hour compliance challenges they will surely face in the future.

347. See Sonderling et al., *supra* note 2, at 84-85.

348. *Id.* at 44-63.

349. See *FTC-NLRB Memorandum of Understanding*, *supra* note 224.