

Tech-Tock

Are employees who check devices off hours entitled to overtime pay?

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IN THE TIME it takes you to read today's New York Law Journal, how often will you check your BlackBerry? Answer your cell phone? Perhaps you will not know the answer because the use of those devices has become so commonplace that it is second nature. But, for employers, the failure to account for employees' time using BlackBerry devices, cell phones and laptops could lead to significant overtime pay claims.

Overtime pay, at its core, is based on "time worked." Regular use for work of laptops, cell phones, or personal digital assistants, also known as PDAs, such as BlackBerry devices and Palm handhelds, would undoubtedly be classified as time worked under applicable regulations governing overtime. In addition, federal and state laws require that an employer keep records of all time worked for those employees who are entitled to overtime. This article will address the legal issues implicated by the pervasive use of these technological advancements that keep us all more connected. For employers, the key to avoiding claims for overtime resulting from the use of BlackBerry devices, cell phones, etc., is developing an understanding of the issues involved and establishing appropriate policies and procedures.

Despite the ubiquitous BlackBerry and cell phone, most employers have not considered whether their employees' use of those devices constitute time worked under federal and state wage-and-hour laws. Most companies distribute devices such as Black-

Berry devices and cell phones simply because they hope that employees will stay connected, resulting in improved productivity or customer service.

Although often not expressly stated, the employee's assumption is that his or her employer wants the employee to use those tools after normal work hours to remain in touch with co-workers, customers, or clients. Thus, many employees independently check their BlackBerry devices when they are away from the office even if there is no formal requirement that they do so. And, many employees have their own cell phones and independently offer customers and co-workers their number—without specifically telling their employer—so they can be accessed during off-hours. Indeed, many employees will say that being available after hours is a demonstration of dedication that likely would be rewarded by the employer. Similarly, many employers appreciate the commitment shown by such employees for taking the initiative in "going the extra mile" for the company.

Nevertheless, whether the directive comes from the employer to stay in touch or the initiative comes from the employee, if sufficient time is devoted to use of BlackBerry devices and cell phones, that time will be time worked under applicable wage-and-hour regulations. It is not a defense to a claim for overtime that the employer did not require the employee to do the extra work. Indeed, the Fair Labor Standards Act (FLSA) defines "employ" to include where an employer "suffers" or "permits" an employee to work.¹ Time worked also includes "work performed away from the premises or the job site, or even at home. If the employer knows or has reason to believe that the work is being performed, he must count the time as hours worked."² Accordingly, if, in fact, the employee worked, the employer must compensate the employee for that time.

Who Is Entitled to Overtime?

In order to determine whether an employee may be entitled to overtime in the first place, the employer must establish whether the employee is exempt or non-exempt. Most employees are non-exempt, i.e., they are entitled to overtime for all hours

worked over 40 in one week.³ Unless an employee is exempt under one of the limited exemptions, he or she is entitled to overtime pay. The limited exemptions primarily are based on an employee's job duties as well as the fact that he or she is paid a fixed salary for all hours worked in one week. The FLSA provides for exemptions from overtime pay for employees who fall under certain classifications: executive, administrative, and professional, as well as certain computer employees and outside sales employees.⁴

For an employee to qualify for an exemption, she must be paid at least \$455 per week and must meet certain other criteria in connection with her job duties. Job titles alone are not determinative as to whether an exemption applies. Similarly, the executive exemption is not limited to vice presidents or chief executive officers and may include certain managers. However, the fact that an employee has the job title of "manager" and earns \$500 per week is not sufficient. One must look beyond the job title to the actual job duties to determine whether an exemption applies. In order for a manager to qualify under the executive exemption, the employee must: have a fixed salary of at least \$455 per week; have as the primary duty management of the enterprise or of a customarily recognized department; customarily and regularly direct the work of two or more other employees; and have the authority to hire or fire or make recommendations as to hiring and firing.⁵

Another common misconception is that paying an employee a "salary" is enough to exempt an employee from receiving overtime pay. However, being paid on a salary basis is only one factor in the exemption analysis. Although most non-exempt employees are paid on an hourly basis, an employee who performs clerical work, for example, and does not meet any of the job duty criteria of the exemptions cannot be exempted from overtime solely because he is paid on a salary basis.

Tracking Employee's Time

Once it is established which employees are non-exempt, and therefore eligible for overtime, the next step is calculating how many hours a non-exempt employee has worked.⁶ Certainly, if an employer is

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not considering employees' use of BlackBerry devices and cell phones as time worked, that employer is potentially in violation of applicable laws and regulations by failing both to pay employees for time worked and to keep accurate records.

However, an employer is not responsible for paying employees for small amounts of time that are insubstantial or insignificant.⁷ According to a federal regulation, "insubstantial 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. The courts have held that such trifles are *de minimis*."⁸

Indeed, according to the U.S. Court of Appeals for the Second Circuit, "[w]hen the matter in issue concerns only a few seconds or minutes of work beyond the scheduled working hours, such trifles may be disregarded. Split-second absurdities are not justified by the actualities of working conditions or by the policy of the Fair Labor Standards Act. It is only when an employee is required to give up a substantial measure of his time and effort that compensable working time is involved."⁹ Factors that may be considered in determining whether work done by an employee should be compensable include the following: "(1) the practical administrative difficulty of recording the additional time; (2) the size of the claim in the aggregate; and (3) whether the claimants performed the work on a regular basis."¹⁰ It should be noted that according to a federal regulation, 10 minutes is not *de minimis*.¹¹

For example, if an employee works a 40-hour workweek, from 9 a.m. to 5 p.m., Monday through Friday, but occasionally checks his e-mail on his BlackBerry over the weekend for a minute here or two minutes there, the employer would likely not have to pay overtime for these few minutes spent above the 40 hours worked during the week. The rationale is that it would be an administrative nightmare to have to record the time for every instance someone checked his or her BlackBerry for such short periods. Further, in the aggregate, the amount of overtime would be nominal. Conversely, if that same employee were checking and responding to client e-mails and returning phone calls over the weekend for extended periods of time, this time would certainly be compensable overtime.

On-Call Time

Another issue about which employers should be concerned is in connection with employees "on call" and whether such time is time worked under applicable law. "An employee who is required to remain on call on the employer's premises or so close thereto that he cannot use the time effectively for his own purposes is working while 'on call.'"¹² Where an employee is unable to use the time effectively for his own purposes, he is considered to be "engaged to wait" and is, thus, working.¹³

However, an employee who is not required to remain on the employer's premises but is merely required to leave word at his home or with company

officials where he may be reached is considered to be waiting to be engaged and is not working while on call.¹⁴

Thus, as applied to the high-tech world, an employee is not considered to be working if she is connected via her BlackBerry or cell phone in case she is needed and is free to move about and conduct her own personal business. Employers who have employees who need to be available on short notice could provide those employees with a cell phone or pager, allow them to be free until needed, and save the expense of paying someone to be literally "on call."

Caution on Exempt Employees

Another potential pitfall involves exempt employees. In order to maintain the exempt status of an employee, the employee must be paid his or her full salary for any week in which he or she performs any work. A problem may arise, however, where a company has an exempt employee who is on unpaid leave. If the employee checks his or her BlackBerry and makes work-related calls for more than a *de minimis* amount of time, the employee would be entitled to be paid for that entire week so that the exemption could be preserved. Notably, the loss of the exemption status may not necessarily be limited to that one week. The Department of Labor could determine that the exemption is lost for the entire statute of limitations period.¹⁵ Accordingly, even for exempt employees, it is important to have a policy explaining the company's position on working while on unpaid leave, particularly in light of the potential economic consequences from inattention to this issue.

Uniform Policy

The key is that employers must be aware of these issues so as to not fall victim to a claim of overtime pay. In the absence of a proper policy governing employees' time and adoption of a sound methodology for recording that time, employees could assert claims for overtime leaving the employer without a way to defend itself. Indeed, regulations place the duty to control the amount of work performed by employees on management, which must ensure that employees are not working at times that the company does not wish work to be performed. Similarly, an employer "cannot sit back and accept the benefits [of employees' work] without compensating for them."¹⁶ Importantly, a company's mere promulgation of a rule against employees working overtime is not sufficient. Indeed, to the extent an employee "breaks the rule" and works overtime without permission, the employer must still pay the employee. The employer's remedy is to enforce workplace discipline for violating the rule.

In sum, it is essential that employers consider these issues and decide whether they prefer to limit non-exempt employees to spending only a *de minimis* amount of time checking e-mails and making

calls outside their normal work hours or whether they freely should be permitted to check e-mails and use their cell phones. If the latter, employers must also develop a mechanism by which employers will track all time worked, including that time devoted to use of PDAs, cell phones, and laptops.

The most important point for employers to heed is that it is necessary to create a policy that is workable, capable of recording all time worked, and uniformly enforced. If employers take note of this warning, employers can reap the benefits from the ever increasing high-tech world rather than the risk.



1. Fair Labor Standards Act of 1938, 29 U.S.C. §203(g). See also, 29 C.F.R. §785.11 ("Work not requested but suffered or permitted is work time").

2. 29 C.F.R. §785.12

3. 29 U.S.C.A. §207 (a)(1).

4. The general requirements for the major categories of exemptions are set forth in the U.S. Department of Labor Regulations. For the executive exemption, see 29 C.F.R. §541.100; for the administrative exemption, see 29 C.F.R. §541.200; for the professional exemption, see 29 C.F.R. §541.300; for computer employees, see 29 C.F.R. §541.400, and for outside sales employees, see 29 C.F.R. §541.500. It should be noted that the New York State Department of Labor relies upon the federal regulations when investigating an overtime claim.

5. 29 C.F.R. §541.100(a).

6. Regulations require that an employer keep accurate records of all time worked by non-exempt employees. 29 C.F.R. §516.2(a)(7).

7. 29 C.F.R. §785.47.

8. *Id.*

9. *Reich v. New York City Transit Authority*, 45 F3d 646, 652 (2d Cir 1995).

10. *Id.*

11. 29 C.F.R. §785.47.

12. 29 C.F.R. §785.17.

13. 29 C.F.R. §785.15.

14. 29 C.F.R. §785.17.

15. The statute of limitations ranges from as low as two years under federal law to up to six years under New York law.

16. 29 C.F.R. §785.13.