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# Monitor after-hours work to avoid trouble

Whether it's a banker on a BlackBerry, an inventor on an iPhone or a pediatrician on a Palm Pre, smart phones are becoming as familiar in the American workplace as the communal coffee pot.

Given the potential of such personal digital assistants to boost productivity — and employee happiness by unshackling workers from their desks — it is no wonder that some employers are making the devices more widely available to their staff members.

But bosses in rapture over the thought of being able to text their subordinates 24/7 on shiny new handhelds should use caution: Employees' use of smart phones for work outside of the normal workday should be closely monitored to ensure compliance with federal and state labor laws.

Companies that neglect these concerns may find themselves on the receiving end of a costly and embarrassing lawsuit.

### The dawn of 'Blackberry claims'

Three employees of T-Mobile USA caused a stir in employment law circles in July when they filed a class action lawsuit against the company, claiming widespread violations of the federal Fair Labor Standards Act (FLSA), as well as New York and California wage and hour laws, in relation to their use of PDAs.

Plaintiffs Miguel Agui, Alexander Reyes and James Gipson, who worked as sales representatives for T-Mobile, allege they were "required to review and respond" to work-related "e-mails and text messages at all hours of the day," whether or not they were logged into the company's computerized time-tracking system. They further assert that they were required to respond to e-mails, texts and phone calls on their work-issued smart phones on their days off.

T-Mobile has denied the allegations. According to the company, if any violations occurred, it was the employees' fault because they failed to inform the company that they worked off-hours.

Although the outcome of the T-Mobile case is far from clear, it underscores the need for employers to understand how technologies in the workplace must be made compatible with existing wage and hour laws.

### Don't CTRL+Alt+Del the FLSA

Whether workers are entitled to any particular treatment for off-hours Blackberry time depends on whether the employee is subject to the FLSA and the Ohio Minimum Fair Wage Standards Act.

Most executive, professional and supervisory employees are not covered. They must endure the boss's late-night e-mail barrage if they want to stay employed.

On the other hand, the FLSA mandates that support staff, such as administrative assistants, paralegals and bookkeepers, receive minimum wage, plus time and a half for work in excess of 40 hours a week.

The U.S. Department of Labor requires employers to keep detailed

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records regarding these workers to show they are being paid according to law.

However, because an employee's status can vary depending upon a variety of unique factors — such as job duties and whether the employee is salaried, hourly or on commission — employers should consult with counsel to ensure they are categorizing their staff members accurately.

### The FLSA applies; now what?

Employees covered by the FLSA must be compensated for all the time they actually work. In other words, if Sally the supervisor sends Emily the employee an e-mail outside of Emily's normal work hours, Emily must be paid for the time it takes to read and respond to that e-mail.

But what if Sally tells Emily, "Please keep an eye on your iPhone this evening because I will likely have revisions to the proposal"?

Although few courts have considered this issue in the context of smart phone use, many have looked at whether "on-call time" counts as work time when an employee carries a pager.

Typically, if the employee's personal pursuits are significantly burdened by the boss's request to wait (for example, if Emily must remain within five minutes of the office so she can zip back and log on once Sally's edits arrive), then she must be paid for the waiting time.

However, if the employee remains free to come and go as she pleases during the wait time — out to dinner, to a movie — she won't be paid to wait for the boss's e-mail to arrive. This suggests that as the capability of smart phones increases, such that work can be conducted any time or place, employees may be compensated for less time in the run up to off-hours work.

### Some practical tips

Companies considering issuing smart phones to FLSA-covered workers, reimbursing them for related costs or simply allowing them to use their own devices to perform employment tasks should work with counsel to create a policy that makes clear to both employees and managers when after-hours work is permitted — if ever.

It should also mandate that employees report all Blackberry time worked. With careful planning, businesses should be able to stay ahead of the curve in this fast-evolving area of labor law.

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