



PDA After Hours

Insights

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Depending on who you ask, PDAs are either the greatest workplace innovation since desktop computers, or the bane of an employee's existence. In today's wireless environment, BlackBerrys, iPhones, and other handheld devices increasingly provide employees with round-the-clock access to email from remote locations. While wireless gadgets allow us to maximize productivity in competitive economic times, they may also give rise to overtime, minimum wage and other wage payment claims.

Managing tech-savvy employees has become the latest compliance challenge under the Fair Labor Standards Act (FLSA).

The New Lay Of The Land

The FLSA requires covered employers to pay non-exempt employees at least the federal minimum wage for all hours worked, along with an overtime premium of one and one-half times the regular rate of pay for "all hours worked" in excess of 40 in any workweek. For purposes of the FLSA, "hours worked" are comprised of all hours that the employee is "suffered or permitted to work." With the exception of *de minimis* activities (small, trivial, or token amounts), any work that benefits the employer is likely to meet this standard, so long as the employer knows, or has reason to believe that it is being performed.

"Hours worked" are compensable as a matter of law, regardless of whether you require an employee to perform them. Failure to compensate an employee for "all hours worked" may give rise to a claim for two years of backpay, or three years in the event of a willful violation, along with attorneys' fees and costs. In the event that those hours end up boosting an employee beyond 40 hours worked in any given workweek, there is liability for unpaid overtime compensation as well. To make matters worse for the employer, the FLSA also provides for the recovery of liquidated damages in the amount of double the backpay award.

The concept of *de minimis* activity remains a murky area: time spent sending and receiving emails can really add up. Consequently, failure to adequately compensate employees for such activity can prove to be a costly proposition. Adding more fuel to the wage-payment fire, collective actions are often available in these cases. Such actions have become increasingly prevalent in states such as Florida, a hotbed for FLSA litigation in recent years.

Since handheld devices capture electronic time-entry data, employees who expect to be paid for time spent tapping away at their BlackBerrys after hours may have a built-in mechanism for tracking time within these devices. In the event that the employee chooses to utilize the device on the way to and from work, the work day itself could become further expanded. These same considerations may apply to employees who choose to remotely access their emails via desktop computer, check voicemail, or even call into the office for work updates.

As times change, 20th century policies designed to regulate conventional time computation practices may no longer fit today's workplace. With the rapid growth of a "perpetual workplace," employers are finally confronting the proposition of evaluating just how many hours these employees are actually working, and evaluating whether they are properly classified from an exemption standpoint.

A Few Defensive Ideas

To reduce exposure, we advise re-examining all positions to ensure that the employees occupying them are properly classified. You should then develop or revise pay policies and procedures to encapsulate review, preparation and transmission of email outside of standard business hours.

Those employers that don't require utilization of BlackBerrys or other "smart phones" can limit their legal exposure even more by prohibiting server linkage to these devices after hours, and establishing that prohibited use can lead to disciplinary action up to and including termination. Even in the event of a policy violation, however, the employer should still pay any overtime or other wages due. Moreover, increasingly savvy employees may establish server access even in the absence of furnished devices. Check with your IT specialist to gain a better understanding of your company's vulnerabilities, along with any means for blocking remote system access.

On the other hand, many employers not only permit the use of PDAs, but actively encourage connectivity by purchasing such devices. Such employers should consider a policy clearly stating that non-exempt employees are required to report all hours worked, including time spent on BlackBerrys, cellular phones, email, the internet, etc., for business purposes.

You might also consider requiring employees to copy supervisors on all work-related emails to help track time worked. Although this should not serve as a substitute for reporting actual hours worked, a time and date stamp on emails may help to further preserve records in the event of subsequent litigation. And consider including a policy which provides clear expectations on how employees should manage their time when using the devices after hours to conduct work. For example, employees may be required to spend the minimum amount of time necessary to complete a task, and to work in consecutive blocks of time instead of the sporadic intervals that can complicate time keeping.

Lastly, regardless of whether remote access is permitted or prohibited, your policy should be clear as to what constitutes PDA "use," and the types of activities that should be reported for purposes of hours worked.

How It All Adds Up

Although litigation regarding this issue is relatively new and the majority of courts have yet to take a definitive position, it appears that even reading or monitoring a BlackBerry or cell phone can amount to time worked under the FLSA. Keep this in mind, along with the unique aspects of your business, when drafting your policy.

Related People



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