

PUBLICATION

Do Your Hourly Employees Work After Work?

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The widespread use of mobile communications technology has resulted in many companies allowing – even encouraging – their employees to work after hours and away from work. For example, many employers issue BlackBerrys or similar smart phones to their employees and expect their employees to be available and to respond to email or phone messages in the evenings and on weekends. Others require employees to coordinate work by email or by texting in the mornings before meeting at a job site.

Do your employees email, text, or make calls for your company before or after their regular work hours? For salaried, exempt employees, such after hours' work is not a concern. By contrast, by encouraging – or even merely acquiescing – to non-exempt employees performing such work after hours, employers may be inadvertently exposing themselves to overtime liability under the Fair Labor Standards Act (FLSA)

This year, several FLSA lawsuits have been filed by hourly workers alleging that their employers failed to pay them for off-duty emailing and texting. In one case currently pending in New York, a group of employees have sued a major telecommunications company alleging that the company required them respond to work messages after hours without pay. The New York suit is in the early stages, but it is likely that more suits of this nature will follow as employees realize that such claims may have merit.

Under the FLSA, an employer is obliged to pay employees for work the employer has "suffered or permitted," regardless of whether the employer requested that the work be performed. The FLSA regulations are clear: it's management's duty to exercise its control and see that work is not done if it does not want it performed. In the absence of an instruction to the contrary, all work done on the employer's behalf is considered work time and is compensable. This rule is traditionally applied in the context where employees continue to work after the end of their shift, regardless of whether at the employer's jobsite or at a remote location. New technologies do not change this rule but certainly make it easier for employers to allow hourly employees to continue to work after regular work hours.

In addition, these technologies make overtime claims easier to prove because electronic devices create a record of work that may well corroborate employees' claims. Under the FLSA, employers can be liable for up to two years of back pay for overtime and can be liable for up to three years of back pay where the employer's conduct has been willful. The FLSA also allows successful claimants to recover their attorneys' fees from their employer. In context of a collective action, such damages can be considerable.

Employers can reduce exposure to such overtime claims in several ways:

- Only issue BlackBerrys or smart phones to salaried, exempt workers and not hourly employees;
- Implement and enforce policies that prohibit nonexempt employees from using such devices for work purposes or from using company email outside of work hours;
- Implement and enforce agreements with hourly employees that set parameters for how the employees will use such devices and how much work they will perform in exchange for additional compensation;

Often, if the amount of time employees will work can not easily be determined or recorded, a pre-agreed amount of compensation may be allowed. Such agreements must be reasonable and entered into by the employee of his or her free will. The employer must consult with the employee regarding the time that is actually expected, or it must provide a mechanism for adjustment so that the agreement is not simply a unilateral determination by the employer how much will be paid regardless of the actual work performed.

If the amount of work that will be done is known or is easily recorded, the employer may be required to pay hourly wages accounting for overtime and require the employee to record all time actually worked. In no event may an agreement circumvent the FLSA's requirement that hourly workers be paid for one and one-half of their regular wages for overtime work.

The easiest approach for some employers may be to simply not issue such devices to hourly workers and to prohibit them from working off the clock. For many businesses, however, emailing, calling and texting with nonexempt employees has become essential to their operations. For those employers, having a written policy that is responsibly enforced and agreements with key hourly employees is a wise course of action.

Baker Donelson stands ready to assist you with these and other labor and employment-related challenges. Contact any one of our nearly 70 Labor & Employment attorneys located in *Birmingham, Alabama; Atlanta, Georgia; Baton Rouge, Mandeville and New Orleans, Louisiana; Jackson, Mississippi; and Chattanooga, Johnson City, Knoxville, Memphis and Nashville, Tennessee.*

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