

NEWSLETTERS

The Weary Worker: Overtime Considerations For Non-Exempt Employee Mobile Device Use

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There are clear advantages to having employees bring their own devices (BYOD) to work. By choosing their own work tools (smart phones, tablets, etc.), employees can optimize their work place effectiveness. Further, employers who permit freedom of device choice can attract and retain a more diverse workforce and can often reduce infrastructure costs. On the other hand, there are potential pitfalls to the BYOD environment including hidden costs, increased security risks, privacy concerns and - the topic of this article - potential overtime issues for non-exempt employees.

According to the [Kleiner Perkins Caufield & Byers's annual Internet Trends report](#), the average person checks their phone 150 times per day (about every 6.5 minutes while awake)[accessed August 15, 2014]. If work related emails are pushed to an employee's device after hours, the employee will likely feel obligated to review and respond to those emails. The question becomes, if the non-exempt employee reviews and responds to emails outside of work hours, are employers expected to compensate employees for the time? This question may be answered by the resolution of a currently pending overtime case in Illinois.

The Fair Labor Standards Act (FLSA) states that "non-exempt" employees must receive overtime pay when they work more than 40 hours per week. 29 U.S.C. § 207(a). Employers, however, do not have to compensate employees for overtime if that time is "de minimis." 29 C.F.R. § 785.47 (2009).

"[D]e minimis" time, includes "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" and only applies "where there are uncertain and indefinite periods of time involved of a few seconds or minutes duration, and where the failure to count such time is due to considerations justified by industrial realities." *Id.* (internal citations omitted).

In a recent federal district court case, a police officer brought suit against the Police Department for back pay, alleging that the Department, without compensating him accordingly, required him to work overtime and "be available twenty-four [hours] per day via BlackBerry." Although the case is still pending, the plaintiffs have already earned an early victory as the federal district court granted certification of the collective action on behalf of the city's police officers.

There are several steps an employer can consider to reduce risk associated with these types of claims. **First**, the employer can limit the

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use of mobile devices for work purposes to exempt employees. **Second**, the employer can (and, if mobile devices are being used for work, should) develop a policy that addresses the issue of receiving, reviewing and responding to emails outside of work hours for non-exempt employees.

Third, the employer can implement mobile device management (MDM) software that can turn off the deployment of email to non-exempt employees outside of work hours. MDM software provides an increasingly flexible way to address changes in mobile device technology. A list of MDM software providers and a comparison of their respective capabilities is available [here](#) [accessed August 15, 2014].

Other countries have found different ways to address this issue. For instance, in France, employer federations and unions recently signed a new labor agreement that requires employers to make sure certain types of [employees “disconnect” outside of work hours](#) [accessed August 15, 2014]. This mostly aspirational agreement applies to independent workers that are not subject to the 35-hour work week or 10-hour-day limit and serves as an acknowledgement that the independent workers have the right to a daily rest from work. The agreement allows for employees, with the employer’s acknowledgement, to stop using work tools such as email and smart phones after the maximum 13-hour day. In Germany, Volkswagen AG turned off email to certain classes of employees between 6:15 p.m. and 7 a.m. *Id.*

In sum, the FLSA is implicated if an employer has non-exempt employees who work more than 40 hours per week, including time spent performing work tasks via mobile device. The consequence of violating the FLSA may entail payment of unpaid minimum wage, unpaid overtime compensation, or liquidated damages. See 29 U.S.C. § 216. In the Bring Your Own Device context, where employees will inevitably be accessing their devices outside of normal work hours, creating and communicating clear policies becomes particularly critical. Best practices dictate the consideration of the FLSA and specifically non-exempt employee mobile device use when drafting a BYOD or other Mobile Device policy.

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