

"Smart Phone" Usage Can Lead to Employment Class Action Litigation

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Thinking about texting or e-mailing your Assistant with a question when he or she is "off work?" You better think twice, requiring a non-exempt employee to perform work "off the clock" can lead to huge wage and hour problems under the Fair Labor Standards Act ("FLSA"). Worse case scenarios can even include having to spend tens of thousands of dollars to defend against a class or collective action.

BlackBerrys, I-phones, Palm Pres and other smart phones are no longer status symbols but are ubiquitous. Hourly employees expect to be paid for the time spent tapping after hours. Requiring your non-exempt employees to handle work related e-mails, texts and telephone calls without compensation will result in lost wages, liquidated damages and attorneys fees.

Lawsuits brought by employees claiming they were not properly paid for overtime has increased

exponentially and the surge is not expected to end soon. Class and collective action wage and hour claims are sometimes state-specific and sometimes multijurisdictional. These claims have resulted in massive awards and settlements that have crippled employers. Employers should be wary of allowing non-exempt employees to perform work on wireless electronic devices after hours.

The publicly traded real estate giant CB Richard Ellis was hit with a wage and hour suit in March 2009. John Rulli, a Wisconsin maintenance worker claimed he and other non-exempt employees were required to use company issue BlackBerrys after hours in violation of the FLSA. He filed the lawsuit individually and on behalf of similarly employed CB Richard Ellis maintenance workers throughout the nation. Damages could be significant if the lawsuit is certified as a class action.

Last summer, ABC News stripped all of its writers of company-issued BlackBerrys after three new writers declined to sign a waiver

acknowledging they would not be paid for using the devices after hours. It is questionable whether the waivers would have held up in court. Employees cannot waive their rights under the FLSA. The FLSA requires employers to track non-exempt workers' hours. Regardless of internal company policy, employers are required to pay non-exempt employers for the hours they work – including unauthorized overtime.

In *Agui v. T-Mobile*, the plaintiffs seek to recover wages on behalf of themselves and other retail sales associates and supervisors for time worked "for which they received no compensation at all." Specifically, they allege that they "were required to review and respond to T-Mobile e-mails and text messages at all hours of the day, whether or not they were punched in to T-Mobile's computer-based timecard system." The case is brought as a putative collective action against T-Mobile and its management, identified as "John Does #1-10," pursuant to the provision of the FLSA that permits liability against individuals, and is



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also being brought against T-Mobile as a putative class action pursuant to the California Wage Law for the California class. If a class is certified by the court, putative plaintiffs won't have to affirmatively opt-in to the lawsuit under the California Wage Law. Those putative plaintiffs who do opt-in, pursuant to the procedure under the FLSA, can hold the individual managers jointly and severally liable for damages.

Employers cannot dodge the issue by simply reclassifying workers as FLSA exempt. An employee is not exempt unless she or he falls into one of several exemptions such as: executive, administrative, professional, computer professional and the highly compensated. A word to the wise: titles are irrelevant. Each exemption must satisfy several highly technical tests. It is a safe bet that most tradespersons, office workers and other employees

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will be considered non-exempt and candidates for compensation when they work using their smart phones and other wireless electronic devices. It does not matter whether or not the employee is salaried.

Employers should be mindful of the pitfalls created by a digital workforce and take the appropriate precautions. Policies should be reviewed and consideration should be given to preventing non-exempt employees from checking or responding to e-mail or performing other work related tasks remotely outside of normal working hours

or without express authorization. However, this may be difficult to enforce. BlackBerrys are called "CrackBerrys" for a reason.

A better policy is to ensure policies clearly state that employees must report all working time spent on portable electronic devices. For example, employees should be informed that they must report all time spent reviewing and/or responding to e-mails outside of normal working hours, in order to ensure that they are properly compensated for all working time. Id.

One extremely talented employment defense attorney has remarked that she does not know why her plaintiff employment attorney friends still mess around with run of the mill discrimination lawsuits. The recent amendments to the FLSA, and the regulations interpreting them, are so complicated that the majority of Employers are not in compliance. Compared with the requirements for establishing liability under Title VII and its progeny, it is as though employers are strictly liable for FLSA violations.

Employers without policies

regulating performing work on electronic gadgets after hours should establish them. One of the best investments an employer can make is to consult its attorney before implementing any new human resources policy. The \$64,000 question is whether or not the employees in question are exempt or non-exempt. Your attorneys at Kutak Rock stand ready, willing and able to assist with this as well as any other employment issues you may have. We are only a phone call, a text message or an e-mail away (even after regular business hours).

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