

EMPLOYEES' USE OF "SMART PHONES" MAY LEAD TO "DUMB" OVERTIME CLAIMS

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Many employers permit or encourage employees to use some sort of personal digital assistant (PDA) or BlackBerry device. PDAs, BlackBerries, iPhones, and other so called "smart phones," have a number of convenient uses. Most significantly, PDAs can make and receive business calls, and can send and receive business emails and documents.

The use of PDAs by employees can create perpetual and infinite workplaces. Without the usual limits of time and space, employees may work harder and longer hours via PDA. Employees may respond to work-related emails or phone messages via PDA at home, during lunch, on weekends, or on vacation. For non-exempt or hourly employees, using PDAs for work beyond the usual business hours may become compensable overtime under the Fair Labor Standards Act (FLSA).

The FLSA generally requires covered employers to pay employees at least the federal minimum wage for all regular hours worked. The FLSA generally requires covered employers to pay overtime of 1.5 times the regular pay rate for more than 40 hours of work by hourly employees in a workweek. The FLSA includes exemptions from minimum wage and overtime requirements for workers in bona fide administrative, executive, professional, computer, or outside sales positions. Exempt employees fall outside of the FLSA's overtime provisions.

Under the FLSA, non-exempt or hourly employees must receive compensation for "all hours worked." The determination regarding actual "hours worked" investigates the time employees are "suffered or permitted to work." PDAs can create circumstances under which employees are "permitted to work" at any time and at any place. Moreover, PDAs create detailed background data that will track the time of day, duration of work, and content of work transmitted in text. The PDA may not capture data about how much time an employee spent composing a responsive email or editing an attached document. The detailed background data, however, may become useful for employees to prove overtime claims against their employers under the FLSA.

A non-exempt employee who has not received compensation for "all hours worked" can claim two years, and sometimes three years, of unpaid overtime wages. Additionally, the FLSA allows employees to file class-action lawsuits for unpaid overtime for a class of similarly situated employees.

Consequently, employers must properly classify employees as exempt or non-exempt under the FLSA. The *administrative* exemption applies to employees involved in management or general business operations who exercise discretion and independent judgment on "matters of significance." The *executive* exemption applies to employees involved in managing a business, directing two or more subordinates, and hiring or firing other employees. The *professional* exemption applies to employees involved in work that requires specialized knowledge generally acquired through a four-year university degree.

The *outside sales* exemption involves regular work outside their employer's workplace such as making sales or obtaining contracts or orders. The *computer employee* exception involves work as computer systems analysts, computer programmers, software engineers, or other similarly skilled computer employees.

Disgruntled employees or recently terminated hourly employees could make overtime claims for their “PDA time.” Thus, employers should take precautions now to classify all of their exempt employees properly. Employers should also carefully create written policies and procedures that address the use of PDA’s by hourly employees. Those polices should:

- Place specific limits on when hourly employees may use PDAs for work purposes after work hours.
- Require hourly employees to get permission before using personal PDAs during or after work hours for work purposes.
- Have employers issue company-owned PDAs only to exempt or salaried employees.
- Discourage hourly employees from purchasing their own PDAs and using their own PDAs to perform work outside of the office or after designated work hours.

These policies may prevent a disgruntled employee from making a fraudulent claim for “PDA time.” PDAs are very similar to computers because PDA’s will record each individual action. An investigation of the PDA may yield information to determine if and when an employee actually used the device. If the employer assigns company-owned PDAs to employees, then the employer has fewer obstacles to accessing the data stored on its own PDA device.

Employers should also remain mindful about the timing and frequency of contacts with off-duty hourly employees through their PDAs. Some employers expect employees to remain constantly accessible through some form of communication. These employers’ expectations may create secondary expectations for hourly employees to monitor their PDAs and to respond to work-related communications immediately.

Therefore, employers should advise hourly employees to spend only minimal time checking messages and emails from outside the office or after work hours. Otherwise, employers should advise hourly employees to report on time sheets any time outside of normal work hours spent checking for the employer’s messages and emails. The failure of employees to report PDA work on time sheets could create evidence for employers in defense of future overtime claims under the FLSA.

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