

## **LAW JOURNAL NEWSLETTERS**

Employment Law Strategist

June 2012

### **Electronic Handheld Devices**

*Can You Give Them to Non-Exempt Employees?*

By Karla Grossenbacher

More and more these days, employers are demanding that employees carry electronic handheld devices, such as BlackBerries or I-Phones, so that they can be contacted via e-mail no matter where they are. This expectation often continues even after the work day has concluded, leading to, among other things, complaints about work/life balance.

However, there are also substantial legal risks associated with requiring employees to carry electronic handheld devices. One of the most significant issues is the potential liability under applicable wage and hour laws for "off-the-clock" work performed by non-exempt employees when they read and respond to work e-mails after their regular work hours have ended.

#### **Off the Clock**

If a non-exempt employee reads or responds to work e-mails outside of regular work hours, the employee is considered as performing work. The real question is whether or not this time is compensable under applicable wage and hour laws. The Fair Labor Standards Act (FLSA) provides, for example, that an employer must pay for work that it "suffers or permits" to be performed. This usually boils down to whether or not the employer knows that the employee is performing the work. Generally speaking, if the employer is not aware that the work is being performed, then it has not "suffered or permitted" the work to be performed, and it is not compensable. However, there are many permutations to this inquiry. For instance, if the employer issues an electronic handheld device to an employee, it could be argued, depending on the circumstances, that the employer was not only aware of the possibility that the employee might use it after hours, but actually intended the employee to read and respond to e-mails after hours. Also, it is important to keep in mind that, when e-mails are sent and received on an electronic handheld device, they do not disappear into the ether. The device itself keeps a record of the work performed. Thus, for example, if a supervisor sends an e-mail to a non-exempt employee after hours, that fact will be documented on the device. Of course, the mere fact that a supervisor sends an e-mail to a non-exempt employee after hours does not, in and of itself, establish that the employee performed work after hours.

It may be the case, for instance, that the employee did not see the e-mail until the following day during regular work hours, and only responded to it then. However, if the employee responds to the supervisor's e-mail outside of normal business hours, there is a record on the device that the employee read and drafted a work e-mail (and, in some cases, roughly how long it took the employee to do this if the response is immediate.) It would be hard to argue under these circumstances that the employer did not have actual or constructive knowledge that the work was being performed after hours when there is a documented e-

mail exchange between the employee and her supervisor after hours recorded on the device.

### **What Is Compensable Time?**

However, simply because a non-exempt employee reads or responds to a few work e-mails after hours, does not automatically mean the time is compensable. The employer has a few arguments available to it about why time spent by non-exempt employees reading and responding to work e-mails after hours should not be compensated.

First, the employer can argue, depending on the circumstances, that such time is merely "postliminary" or "preliminary" work. Under the FLSA, there is a principle that states generally that work performed before or after an employee's shift is not compensable if it is preliminary to or postliminary to the employee's principal job activity. For example, in the case of employees who are maintenance technicians performing a series of maintenance calls at customers' homes during the work day, time spent receiving, mapping and prioritizing jobs and routes for assignment before leaving their homes in the morning could be considered non-compensable preliminary work on the theory that it relates to the employees' commute and not their principal job activity. However, this is a very fact-intensive inquiry.

Second, if the non-exempt employee only spends a few minutes reading or responding to e-mails after hours, the employer can argue that the time is non-compensable because it is "de minimis." The idea is that, if the increment of time spent performing work is so small, it is not worth documenting, tracking or compensating. There is no hard and fast rule on what amount of time is considered de minimis. Many courts have indicated that it is 10 minutes or less. However, it is a tricky concept, as some courts will also look at the aggregate time spent by the employee over a period of time in determining whether the time spent is de minimis. For example, if the employee is e-mailing on her BlackBerry after hours for 10 minutes every day for a year, that would add up to a significant amount of time. Thus, the more regularly the employee works small amounts of overtime, the less likely the time spent will be considered de minimis. On the other hand, sporadic or irregular instances of small amounts of overtime would more likely be considered as such.

### **Avoiding Litigation**

So what is an employer to do? The only definitive way to avoid potential litigation on the issue is not to give electronic handheld devices to non-exempt employees. However, if due to business needs, the benefit of giving electronic handheld devices to non-exempt employees outweighs the litigation risk, then there are a few steps an employer can take to minimize the risk of an adverse outcome if wage and hour litigation ensues.

#### **1. Have a Policy in Place**

This policy could address a number of issues that would limit the risk of providing electronic handheld devices to non-exempt employees. For example, it could require all non-exempt employees to record any time spent after hours reading and responding to work e-mails. The employer could also set a limit on the amount of time that non-exempt employees can spend reading and responding to e-mails outside of their regular shifts without advance approval. The policy can also provide that, even though employees will be paid for all overtime worked, if they exceed this limit without getting advance approval, they will be subject to discipline. In addition, the policy could include an affirmative statement that, simply because an employee is being given an electronic handheld device, this does not

mean that he or she is "on call," as some employees may become confused on this issue if they are asked to carry a company-issued electronic handheld device.

## **2. Disseminate the Policy**

It is never enough simply to have a policy. It needs to be distributed by a method that can be documented, and employees should be asked to sign an acknowledgment of the policy. The policy statement could also be reiterated in an agreement the employee is required to sign as a condition of receiving the electronic handheld device.

## **3. Train Managers**

In addition to having a policy and disseminating it, managers must be trained on the policy. For example, if a 10-minute limit is being placed on how much time can be spent using electronic handheld devices after hours, the management team needs to be aware of these restrictions and abide by them (e.g., not sending e-mails to non-exempt employees after hours that require an immediate, time-consuming response).

### **Conclusion**

E-mail has certainly had an impact on the workplace, and modern technological advances often improve efficiency and speed of communication. However, technology in the workplace must be managed and monitored appropriately in order to minimize legal risk.

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