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E-mails, Phone Calls and Wage & Hour Problems

Some experts believe that the business world is about to be hit by a new wave of litigation in which workers will seek overtime compensation for all the hours they've spent clicking away on their devices.

By Patrick J. Kiger

In one sense, Blackberrys, Palms, "smart" cell phones and other electronic devices are a godsend to companies, since they allow employees to communicate with supervisors and clients and get work done, no matter where they happen to be or what time of day it is. But when it comes to nonexempt employees covered by wage and hour laws, experts say information-age gadgetry has the potential to get employers into big trouble. Some experts believe that the business world is about to be hit by a new wave of litigation in which workers will seek overtime compensation for all the hours they've spent clicking away on their devices.

While a search of the Nexis database failed to turn up any instances so far of wage and hour lawsuits hinging upon Blackberry use, employment law specialists seem to think it's inevitable, given both the proliferation of such devices and the clarity of the law on the issue.

"Nonexempt employees are being tethered to the company with Blackberrys and other devices," says Dan McCoy, an employment attorney and partner in the Mountain View, California, office of law firm Fenwick & West. If a worker gets a message from the boss or a client during breakfast or dinner and answers it, that counts as work time, just as surely as if the employee had come in early to the office or stayed late. "Blackberry time is work time," he says.

Similarly, an hourly worker who participates in a conference call during the drive home is on the clock, if his boss requires him to participate or doesn't stop him from joining in, according to Robin Bond, the managing partner of Transition Strategies, a law firm based in Wayne, Pennsylvania.

Paul Lopez, director of the labor and employment practice at the firm of **Tripp Scott** in Fort Lauderdale Florida, advises companies to move proactively to protect themselves from overtime claims and possible lawsuits related to electronic devices.

The first step is to establish a clear policy on the use of Blackberrys and other devices outside the office, he says. Employees should be told that overtime spent using such devices must be documented, with possible disciplinary penalties for noncompliance.

However, a company should be careful not to state categorically that it will refuse to pay improperly documented overtime, Lopez explains.

"A lot of clients come to me and say, 'I don't have to pay this employee overtime, because they violated the overtime policy,'" Lopez explains. "My response, is, 'Eeehh, that's not quite true.' You can discipline them or fire them, but under the law, technically, you have to pay them. You don't want to promulgate a policy that will lead to an FLSA complaint."

The burden of proof in overtime litigation rests primarily upon the employer, so it's critical to have an effective system for documenting work done with electronic devices, Lopez says. One

simple method is to require employees to copy any mail messages they send to their supervisor, as well as any spreadsheets, reports or other documents that they work on outside the office.

"You want to make sure that when employees are logged on at home, they're actually working, and not just sitting there watching TV or something," Lopez says. "In order to do that, you need to come up with some performance thresholds, rather than just basing it on an honor system."

Alternatively, the company's intranet and mail servers can be set up to generate logs of such remote activity, or even to track keystrokes.

Additionally, Lopez advises companies to compile daily and weekly time sheets that include any hours spent using electronic devices, and to require employees to sign those sheets to verify their accuracy. "Have a specific category on the time sheet for remote access hours," he says.

Lopez says it's not uncommon to have employees who are being let go because of downsizing or performance issues suddenly claim large amounts of undocumented overtime.

"When you're in that situation, you want to be able to pull up hundreds of daily time sheets tracking all their work, and show them where they signed off on those time sheets," Lopez says. "You also want to be able to remind them that they were advised to document their time when they logged on from home. That puts you in the strongest possible position."

"Truthfully, I don't think most employers focus on this stuff, until they get zapped with a lawsuit," he says. "It only takes one time for them to wake up, though."

Keeping and maintaining such detailed records, of course, doesn't come cheap. Lopez says companies should factor in monitoring expenses when they do they do a cost-benefit analysis about equipping employees with Blackberrys and other devices

They also should consider the potential for overtime liability when they weigh whether or not to equip a particular portion of their hourly workforce with remote access.

"If you've got a technical person who is going to be out in the field making repairs, that person probably is going to be communicating only with the office, and that's easy to track," Lopez says. "But when you get into sales or customer service, someone who speaks to clients, that's a potential powder keg of exposure."