



# WORK | PLACE | LAW

## EMPLOYMENT LAW FOR EMPLOYERS

### ARE BLACKBERRIES RIPE FOR OVERTIME LAWSUITS?

People seem to be checking their Blackberries all the time. Everyone expects prompt attention to their requests. The business that moves quickly and can respond to customers 24/7 has an advantage over the competitor who can't.

But are workers entitled to be paid extra for their time spent working by smartphone?

Some T-Mobile employees think so. The employees claim they were expected to review and respond to e-mails and text messages "at all hours of the day and night" and have sued T-Mobile for pay on the time they spent. Verizon, AT&T Mobility, and real estate firm CB Richard Ellis are defending similar lawsuits.

These lawsuits aren't surprising. Federal laws (and state laws) require that employees be paid for "all hours worked." The employer must pay for time worked – even if the work is not authorized and even if the employer requires employees to get permission before working outside of scheduled hours. No contract or policy manual can change this rule, and hourly em-

ployees generally can demand extra pay for extra time worked, including time-and-a-half pay for overtime hours.

### Extra Pay For Everyone?

Of course, not all employees are entitled to extra pay for working extra time. Some employees are "exempt" from overtime laws. Exempt employees can be paid a fixed salary for all hours worked. But not all salaried workers are exempt workers. Some



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salaried workers – including highly skilled workers – are covered by overtime laws, just like hourly workers. For example, bookkeepers and paralegals have skills developed through specialized training, but they generally are not exempt even if they are paid on a salary basis.

### Getting It Right

The rules on exempt status are complex and easy to get wrong. How-

ever, there are two rules that are easy and clear. Rule No. 1: An employee is not exempt unless the employer can prove that the employee meets all legal requirements to be classified as exempt. Rule No. 2: A job title alone isn't enough to justify classifying someone as exempt. To get it right, one must review the employee's actual job duties and compensation, and see if they match up against requirements under federal and state laws defining exempt status.

Federal and state rules for exempt status usually match each other in many respects, but they are not completely identical. There are situations where an employee may be exempt under federal law, but still entitled to overtime under state law (and vice versa). In such situations, exempt status under one law won't protect the employer from overtime liability under the other law. The employer must show that the employee is exempt under all applicable laws.

### 9 to 5 Laws in a 24/7 World

In the 24/7 world, this complexity adds a new dimension of potential liability. Our modern business culture prizes responsiveness and availability. But there is a disconnect between the 24/7 business culture and our

compensation laws. Many of those laws are derived from the Fair Labor Standards Act of 1938, and are still rooted in a “9 to 5” world. Employers still need to follow the old “9 to 5” rules for their non-exempt workers, and record all of their work time and pay for it – whether the work time is scheduled or not.

Wage-and-hour lawsuits are a growth industry. In 2009, the top ten class action settlements under the Fair Labor Standards Act exceeded \$360 million – an increase of more than 43% over 2008. Plaintiffs’ attorneys are looking for more employers to target. One law firm web site speculates that employees have worked “millions of ‘off-the-clock’ hours each year taking and responding to customer and internal phone calls, emails and text messages,” and encourages readers to e-mail the law firm to set up a free case evaluation.

Even small compensation cases can be attractive. Under wage-and-hour laws, a losing employer can be required to pay double damages (triple damages in some states), as well as the employee’s attorneys’ fees. Even a small case can be attractive to an attorney who knows the employer can be required to pay his bills – as well as any damages owed to his client.

**Small Mistakes Add Up Fast.** Liability can add up fast. Imagine a worker with a 40-hour workweek who averages 90 minutes per week of overtime. That’s an average of less than 13 extra minutes per day on calls and e-mails outside of the scheduled workday, but it would create 78 overtime hours per year. If this worker has a \$30 per hour pay rate, the potential liability works out to \$10,530

and applicable FICA contributions. If this employee is part of a group of workers who were all misclassified as exempt, then repeat the math for each misclassified worker. Even in a business of modest size, small errors can quickly compound to hundreds of thousands of dollars in liability. For large businesses, liability can quickly expand into the millions.

### Smart Policies for Smartphones.

You can take several steps to reduce the risk of extra pay for unscheduled smartphone work, such as the following:

- Review personnel classifications and job descriptions for compliance with federal and state exemption rules.
- Issue smartphones to non-exempt workers only if they really need to be available 24/7.
- Educate supervisors and managers on the cost of expecting everyone to be available and responsive 24/7. That 8:30 pm email may need immediate action – or may be able to wait until tomorrow. If the task can wait until the next workday, the manager should not ask for immediate action.
- Clarify policies that prohibit unauthorized work time to explicitly cover smartphone work by non-exempts. Set a rule for the worker who gets that 8:30 pm e-mail inviting work: unless immediate action is requested, the work should wait until his scheduled work time.
- Keep accurate work time records and have employees record their extra work time. If unauthorized time is being worked, you may have to pay extra for it. But if there is a problem, you will see it and can deal with it before it gets bigger.

per year (\$30 x 78 hours x time-and-a-half overtime premium x triple damages).

Wage and hour laws generally allow workers to recover unpaid compensation earned over the preceding two-to-three year period, so those 90 extra minutes per week can add up to more than \$31,000 – plus attorneys’ fees

**Don’t Be A Target.** You don’t want to be a target for these increasingly common lawsuits. There are many steps that can help you reduce your risk (like the “Smart Policies for Smartphones” shown in the box on this page).

Of course, implementing the right steps in the right way requires different actions for different employers. Employment law is complex, and wage-and-hour laws do not mesh easily with the 24/7 business world. Mistakes are easy to make, and can result in costly disputes. Experienced professionals, including legal counsel, can help find the right answers for your 24/7 business in a world still running on “9 to 5” employment laws.

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