

## **WARNING! OVERTIME PAY MAY BE DUE AND OWING FOR TIME SPENT ON TEXTS, PHONE CALLS, AND E-MAILS**

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**I**n the present technological climate, almost every employee, from the CEO to the secretary, regularly relies upon some type of personal digital assistant (“PDA”) or BlackBerry device. Increasingly, businesses expect their workforce to accept and use a company-issued BlackBerry or PDA to stay in touch beyond the normal business hours. However, issuing Blackberries and PDAs to the non-exempt workforce can be problematic for employers under the Fair Labor Standards Act (“FLSA”), because time spent sending and receiving work-related emails or phone calls is almost certainly “hours worked” under the FLSA, and therefore, must be paid.

The FLSA generally requires covered employers to pay non-exempt overtime pay of one and a half times the regular rate of pay for all hours worked exceeding forty (40) in a single workweek. The FLSA includes a number of exemptions from its overtime requirements. However, the general rule is that non-exempt employees must be paid for “all hours worked.” “Hours worked” includes work performed off-premises as long as the employer knows or has reason to know that work is being performed. A non-exempt employee who is not compensated for “all hours worked” can claim up to three years of back overtime wages. Additionally, the FLSA provides a mechanism for employees to file class-action lawsuits for unpaid overtime on their own behalf and on behalf of other similarly situated employees.

Employers cannot turn their heads; rather employers must craft a policy to handle their non-exempt workforce’s BlackBerry and PDA use. First, employers should consider whether their non-exempt workforce should ever be issued Blackberries or PDAs. If employers determine that it is necessary that their non-exempt workforce be issued a BlackBerry or PDA then the employer should also adopt a policy created to clarify expectations as to what is permitted when using the PDA or BlackBerry. For example, a policy may prevent all employees from using a PDA or BlackBerry after normal work hours without the express consent of a supervisor. At a minimum, employers must adopt a policy that requires all non-exempt employees to report, on a time card, any time spent using a BlackBerry or PDA for work related reasons. Employees should submit the timecards at the end of every payroll period, even if they do not have any BlackBerry or PDA time to report. Last, managers and supervisors must be mindful of how much and how often they encourage their employees to use PDAs and BlackBerries.

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