Non-Exempt Employee’s Hours Worked



The Fair Labor Standards Act (29 U.S.C. ž 201 et seq., “FLSA”) requires employers to compensate employees (who are not exempt from its coverage) for all time actually worked. In doing so, they must pay employees at least the minimum wage and overtime for all time worked over 40 hours in one week. Employers must also keep daily and weekly records sufficient to prove the accuracy of the hours worked and wages paid to nonexempt employees or face penalties from the Department of Labor for record-keeping violations.

Nonexempt employees must be paid for all hours actually worked. This may include time spent on PDA’s (iPhones, Blackberries, cell phones etc). Whether the employer purchases the equipment or not may not be relevant in whether they owe wages for hours worked answering emails or responding to requests via phones.

Employers should properly construct their overtime policy to include this issue. When creating your policy consider restricting time that non-exempt employees are responsible for checking their PDA’s or responding to requests. You may also want to consider implementing a permission system (employee must get permission prior to using PDA’s after hours for work related items). For example, if there is a big project and your employee wants to review items or work on it after hours they must get permission prior to actually working. Also included in that policy should be a statement that requires employees to record and report all hours actually working outside of regular work hours.

If employees work on their PDA’s (whether personally owned or company owned) you as an employer are responsible for that activity. If the employee works when specifically told not to that is a performance issue. Don’t confuse a wage issue with a performance issue. You can discipline employees for the use of PDA’s outside of their normal work hours if they have been instructed not to (performance), but you cannot refuse to pay them for their time if you know or should have known they were working.

Watch for case law to further clarify these hours worked rules on use of PDA’s.