

# Daily Journal column: Liability concerns for employers in a wired world

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## Part One: Wage and hour concerns for non-exempt employees

There has been a lot of coverage recently about employee access to and use of social networking sites while at work and outside of the workplace. In fact, at a recent International Association of Defense Counsel Meeting, several presenters discussed the potential uses and abuses of social media by employees. However, the reverse scenario — employees using their computers or wireless communication devices while at home to do office work — deserves equal, if not more, attention.



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Blackberries and other wireless devices provide immediate access to employees. That helps because employers, customers and clients often expect or even demand instant access to, and immediate responses, from employees. But while providing constant, quick access may be a business necessity, it may also have unintended consequences for companies — including overtime claims by non-exempt employees as well as liability to third parties for irresponsible, if not dangerous, behavior by employees using wireless devices while driving. The Fair Labor Standards Act of 1938 establishes minimum wage, overtime and record-keeping requirements for covered private employers and for federal, state and local governments. Specifically, the FLSA requires most employers to pay each of their employees at least minimum wage for all hours worked. Additionally, for employees who are not otherwise exempt, the FLSA requires those employees receive overtime wages for

each hour worked over 40 hours in a work week. Many states also have specific

wage and hour statutes addressing compensation requirements, including overtime wages, which might be more strict than the requirements of the FLSA. Under federal and state laws, disputes often arise about whether particular activities engaged in by an employee constitute “hours worked” that should be compensated under the provisions of the FLSA or applicable state laws. Under the FLSA, the general rule is that all time spent in physical or mental exertion on behalf of the employer counts towards hours worked and must be compensated. Accordingly, the time a non-exempt employee spends using a home computer or wireless communication device on behalf of an employer or in furtherance of his or her job constitutes compensable working time under state and federal wage and hour laws. Regardless of whether employers encourage it, employees will inevitably use a computer or wireless device for work outside of their normal working hours. To the extent they do, they must be paid appropriately.

For example, many employees spend time at home responding to e-mails, either through remote access via their home computer or on a Blackberry or similar device. If the employee is non-exempt under the provisions of the Fair Labor Standards Act, then the time spent responding to e-mails is compensable. An employer who does not account for and pay the employee for this time is subjecting itself to a minimum or hourly wage claim and possibly an overtime claim, depending on the number of hours the employee has already worked during the applicable workweek.

Class actions against AT&T and T-Mobile, among others, highlight the dangers of non-exempt employees using technological devices after work hours. As of June of 2010, AT&T continued to litigate claims by employees in its support and maintenance department that it failed to pay them for off-duty Blackberry and cell phone use. In early 2010, T-Mobile settled for an undisclosed amount, a class action by its technical services employees relating to failure to compensate for off-duty work.

An employee who brings a lawsuit under the FLSA for unpaid minimum wages or unpaid overtime compensation has the burden of proving that he or she

performed work for which he or she was not properly compensated. Generally, the employee's "proof" may be nothing more than his or her credible sworn testimony. However, computers and Blackberries generally create a reliable record of the amount of time an employee has used them, providing additional supporting evidence for an employee who is making a wage or overtime claim. Perhaps the greatest concern about Blackberries and smart phones pertains to tort liability to third parties. That comes from employees who e-mail, text or talk on a cell phone while driving. An examination of those risks will come in part two of this series.

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