

When to compensate hourly employees on BlackBerrys

“We provided BlackBerrys to many of our exempt employees and have been discussing the possibility of providing them to techs who are on the road much of the time. I have become concerned that we will be exposing ourselves to some liability under the Fair Labor Standards Act if techs have BlackBerrys and are receiving and responding to e-mail in off-hours. Is this crazy, or should I really be concerned?”

You have plenty of reason to worry. Those little hand-held devices, so addicting for users, can blur the line between office and home.

Like cell phones and remote-access Internet connections, BlackBerrys allow everyone to work outside the office or after hours. A survey conducted by Cohesive Knowledge Solutions, a company that helps organizations with e-mail efficiency, noted that the average professional spends 50 minutes per day sending e-mail after work.

Indeed, at least one blogger, who complains of tendinitis in her thumbs from BlackBerry use, says her device actually helps her manage her e-mail load because her responses are shorter than they would have been on traditional e-mail.

“You can only type so much on those tiny keyboards,” says writer and blogger Rebecca Skloot. “I feel like the BlackBerry has helped fix my e-mail problem.”

As handy as they are, these little devices can mean big headaches related to wage and hour laws, lawyers say. If your techs are paid hourly and considered “non-ex-



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empt” workers, then the time they spend on their BlackBerrys must be compensated, says J. Nelson Thomas of Dolin, Thomas & Solomon LLP in Rochester. Non-exempt employees must be paid overtime for all hours beyond 40 per week.

“If the techs are responding to their BlackBerrys, they must be paid for it whenever they do it,” he says. “If they are checking the BlackBerrys when they are already on the clock, then that is not a problem. But if they are doing it off the clock, the employer needs to pay for that time.”

Courts interpreting the Fair Labor Standards Act have found that “de minimis,” or insubstantial, time need not be counted, says Sharon Stiller, a partner with Boylan Brown Code Vigdor & Wilson LLP in Rochester. “However, the regulations say that as little as 10 minutes per day is not de minimis. If the technician is non-exempt, the technician will have to be compensated for any time spent working, whether it is working from home or checking a Blackberry, that is more than de minimis,” she says.

Some lawyers say the safest approach in this situation is to stop giving BlackBerrys to non-exempt workers or to have the de-

vices turned in at the end of the work day, but that is not always practical in this day and age. Some also suggest that employers develop policies that state that non-exempt workers should use company-issued devices such as Blackberrys only if they have received specific permission.

The use of BlackBerrys took headlines last year when ABC News asked three new employees to sign a waiver acknowledging that they would not be compensated for work after hours on BlackBerrys it provided. ABC News confiscated the BlackBerrys after the employees were told not to sign the waiver by their union, the Writers Guild of America.

The union negotiated changes in the waiver saying that workers would be compensated for some work, such as booking guests for shows.

The situation described in the question above involves travel time, since the techs are on the road, Thomas notes. “Normally, commute time is not time that needs to be compensated for under the Fair Labor Standards Act. However, travel time during the work day needs to be paid for.”

“If the tech does work at the start of the day by checking the BlackBerry, then the employee has now started working. The time that they drive following the start of that work day is now part of their travel time during their work day and is no longer a commute to start work,” Thomas says. “Since it is not a commute but travel time, that time spent driving needs to be paid for as well.”

Another issue is whether the techs are required to be “on call” when they are

away from the business after normal hours. If they are, the time does not automatically count for determining overtime, says Steven Modica of Modica & Associates in Rochester.

Under the rules on overtime, an employee may be considered “working” based on the frequency of work communications during the on-call time, Modica says. “If your employee is interrupted to such an extent that he or she cannot conduct her regular activities, your employee may be working within the meaning of the law. In addition, an employee who has to respond to a work communication during off hours in a fixed amount of time that is ‘unduly restrictive’ may be working too.”

Numerous additional requirements also must be met for an employee to be considered “off duty” or on “layover” time, he says.

So listen to your instincts and check on the Fair Labor Standards Act. “There have been a flood of lawsuits claiming that certain employees were improperly classified as exempt (and were denied overtime illegally),” Modica says. “Many other lawsuits claim that employees eligible for overtime (non-exempt) were not paid for all hours worked (including a well-known one involving Wal-Mart). You’re right to be concerned.”

Managers at Work is a bimonthly column exploring the issues and challenges facing managers. Contact Kathleen Driscoll with questions or comments by phone at (585) 249-9295 or by e-mail at kadriscoll@aol.com.