

Whether employees should be paid for using company issued Blackberry devices was a question posed over at LinkedIn. I answered the question because I thought it was an especially timely one these days. Lawsuits for unpaid overtime are growing increasingly common. The Fair Labor Standards Act that governs federal overtime law has long been one of the most frequently violated laws in America. As mobile technologies become more commonly used by employees, the wage and hour laws are becoming even more difficult for employers to correctly apply.

Under the Fair Labor Standards Act, an employee must be paid anytime the employer “suffers or permits” the employee to work. Suffer or permit to work means that if an employer requires or allows employees to work, the time spent is generally hours worked. If the Blackberry is being used to conduct business, the employee has spent time working and must be paid for it.

How much the employee must be paid is another question that is more complicated. If the employee is paid a salary and is exempt from overtime premium payment requirements, then the employee is not entitled to any compensation beyond the salary. (Exempt employees who are paid only on a commission basis also need not be paid additional compensation). If, however, the employee is not paid a salary then some additional compensation for the time spent “blackberrying” must be paid.

The two most obvious questions that arise when deciding how much to pay an employee for Blackberry time are: (1) when does the compensable time start and end; and (2) what is the pay rate at which the employee must be compensated? If the employee is “on call” in a manner that limits the employee’s freedom, then the employer probably has to pay for the entire “on call” period. On the other hand, if the employee is generally free to use their time as they wish until they receive a “call” (or in this case a message), then most likely only the time spent receiving and replying to the message is compensable.

As for the pay rate, the amount must be sufficient to ensure that the employee is being paid the minimum wage when the total compensation for the work week is divided by the total number of hours worked during that week. Similarly, if the employee is not exempt from overtime premium payments, the rate must be sufficient to not only pay the employee the minimum wage but also an additional amount equal to one half of the regular hourly rate for the overtime hours worked, including the time spent on the Blackberry.