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## BUSINESS LAW & LITIGATION

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TO: Clients & Interested Parties

FROM: NLG Professional Staff

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## RE: Do You Need a PDA Policy?

Employers must pay their hourly workers for all "hours worked." This includes all time spent primarily for the employer's benefit, including a secretary's time spent surfing the Internet while waiting for an assignment. "Hours worked" also includes work done off premises as long as the employer knows or has reason to know that work is being done.

Employers often have a written policy against off-the-clock work or unauthorized overtime. Even with that policy, it remains the employer's duty to make sure only authorized work is done. An employer may not accept the benefit of unauthorized work without paying for hours worked.

Enter the wireless handheld device ("PDA"). Increasingly, businesses expect their workforce to accept and use company-issued PDAs. It allows employees to stay in touch beyond the business day by sending and receiving e-mail remotely at any time.

For salaried workers, it is a natural addition to their toolset. Exempt employees are typically expected to complete work without regard to the business day or week. In exchange for a regular paycheck and higher pay, the exempt workforce is not paid for late nights or weekend work, or the occasional e-mail from home. PDA's make exempt employees accessible by allowing instant communication.

Issuing PDAs to hourly workers, on the other hand, is a problem. Time spent sending and receiving work-related e-mails is "hours worked" and must be paid. However, time spent on PDAs almost always happens off-shift. Even with the best intentions, it will be tough to measure off-site working time. Counting PDA time destroys a workweek designed to reach, but not exceed, 40 hours. While truly minor time increments may be disregarded, an employer cannot ignore meaningful work time. It is also not prudent to rely only on the "de minimus" rule because it always gets out of hand. Employers who use them must have a plan to handle hourly worker PDA use.

Most important, employers should seriously consider whether hourly workers need PDAs at all. A PDA is not a status symbol. It is a device that allows employees to work away from the office. PDAs

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are designed to do precisely what employers typically do not want hourly workers doing - working off-the-clock.

The first step is to ask the managers of the hourly workers. Ask why PDAs were issued in the first place. Precisely what productive work is done by PDA, if any. If you do not get a lot of clear answers, take back the PDAs. On the other hand, if you learn PDAs are used regularly and are essential to the business, you have a problem you need to solve.

## **A PDA POLICY**

Once you know PDAs are really necessary for at least some of your hourly workforce, a policy needs to be created. A PDA policy can address many different topics, including:

- Recordkeeping requirements;
- An explanation of what is non-compensable PDA use, like games, applications or personal phone calls;
- General expectations on PDA use;
- Preference of on-the-clock time over PDA time;
- The amount of weekly PDA time permissible without authorization;
- The limited circumstances under which PDAs should be used;
- Any expectations on PDA use while travelling or on vacation;
- Overlap between the PDA policy and any general off-the-clock or overtime policy; and
- Consequences of violating the policy.

The goal of a PDA policy is to create clear, objective expectations so that as little as possible is left to an employee's discretion.

Once a policy is in place, make sure management is familiar with it and manages consistent with it. For example, if the policy says employees should not use their PDAs if it would create overtime, managers should not reprimand employees for not responding to e-mails on Friday nights. Management expectations should reinforce the policy, not undermine it.

## **TIMECARDS ARE BACK**

Federal and state law require recordkeeping. Regardless of the administrative burden or employee preference for estimating, give hourly workers with PDAs paper timecards to record PDA time and require them to do it. Expect employees to capture all of their time. Employees should submit PDA timecards at the end of every pay period, even if they have no PDA time to report.

Policies have no value if not enforced. To ensure your employees are recording their PDA time, check in periodically with managers and compare notes. If payroll records do not reflect the fact that an employee writes detailed e-mails every evening, address the issue and consider discipline.

Much of the hourly workforce has no use for company-issued PDAs or similar devices, and should not have them. For those hourly positions that require PDAs, employers should devise a policy detailing the do's and don'ts, ensure management supports the policy, and set and enforce recordkeeping requirements. Doing so will ensure you take advantage of the benefits of an accessible workforce while minimizing the wage and hour risks.