

## Employer Liability for Overtime Pay for After Hours Work

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Many employers appreciate the employee who is willing to do some work after hours, responding to email, taking or making phone calls or otherwise engaging in work related communications from a laptop, BlackBerry® or other mobile device. It may be convenient when an employee answers the phone or responds quickly to emails or text messages on evenings and weekends, especially when an important project is looming with a tight deadline.

Employers should take notice, however, that if that employee is classified as “non-exempt” under the federal Fair Labor Standards Act (“FLSA”) or the New Jersey Wage and Hour Law, the employee is entitled to be compensated for time spent outside of work on work related communications. That time also counts as hours worked for purposes of determining entitlement to overtime compensation.

### **Hours and Dollars Can Mount Quickly**

Assume, for example, that the diligent employee spends, on average, an extra thirty minutes per day after hours answering the phone and responding to texts and emails. That time results in an extra ten hours a month, or 120 hours a year, or three weeks of overtime per year. Consider next that a business may have several employees doing the same thing. Whether this extra time is compensable at the employees’ regular hourly rate or at time and one-half, those few extra minutes a day can cost a business substantial sums with additional potential liability for double damages and attorney’s fees (both yours and theirs) if the employer has failed to pay the employees for the time and is compelled to do so as a result of litigation or a government audit arising out of a complaint by a disgruntled employee.

### **Practical Considerations for Controlling After Hours Work**

Employers have the right to control and regulate after hours work and have several tools at their disposal to do so effectively. For example, an employer may want to issue mobile devices to non-exempt employees on a selective basis (or not at all). Employers can also utilize software that allows the employer to designate which employees may remotely access the company’s networks and during what hours. Employers should, in any event, have a written policy in place that addresses and regulates after hours work for non-exempt employees. This policy should be in the employee handbook and given to an employee when he or she is assigned a device or network access. The policy should include specific guidelines and limits on how and when non-exempt employees are permitted to use mobile devices and remote network access. Additionally, but no less importantly, the policy should require that non-exempt employees declare the time they spend on after hours work for each pay period and should pay the employees accordingly.

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