

## **BLACKBERRIES AND WIRELESS COMMUNICATION DEVICES: INSTANT ACCESS EQUALS INSTANT EXPOSURE FOR EMPLOYERS**

There has been a lot of coverage recently about employee access to and use of social networking sites while at work. Recently, the [December issue](#) of Nexsen Pruet's employment and labor law newsletter addressed some of the issues facing employers as a result of social networking 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.

Blackberries and other wireless devices provide immediate access to employees. 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 employers – 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.

### **Wage and Hour Concerns for Non-Exempt Employees**

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.

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 (FLSA), 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. Additionally, computers and Blackberries generally create a reliable record of the amount of time an employee has used them, providing supporting evidence for an employee who is making a wage or overtime claim.

## Other Liability Concerns for All Employees

Another concern regarding all, not just non-exempt, employees has to do with tort liability to third parties. The advances in technology not only increase expectations for instantaneous communication but also for multi-tasking, both of which can create a distraction for employees. The most readily recognizable examples are e-mailing, sending text messages or even talking on a cellular telephone while driving a car.

Nineteen states, including North Carolina, have passed laws banning texting while driving. Many more have laws that ban talking on a cell phone while driving, at least without a "hands-free" mechanism. Although South Carolina does not have any law banning texting or cell phone use without a hands-free set while driving, the S.C. House of Representatives recently held a hearing to consider such a bill.

Even without specific laws limiting these practices, however, employees who are engaging in business activities while driving are exposing their employers to increased potential liability. In the case of an individual injured in an accident by an employee who was driving and distracted by the use of a wireless device, the injured party is likely to pursue not only the employee driver but also the employer as liable, particularly where the employer provided the device. An employer may be held responsible under those circumstances.

## Efforts to Minimize Wage Claim and Other Liability Risks

In light of these concerns, some employers may decide not to provide Blackberries, other wireless devices or even laptops, particularly to non-exempt employees. However, a company's business needs may necessitate otherwise. Moreover, even if an employer does not provide the wireless communication device, an employee may opt to use his or her own. If an employee uses a personal cell phone or computer to do work outside of normal working hours or while driving a car, the time is still compensable under wage and hour laws and there are still third-party liability concerns.

Regardless of whether wireless communication devices are provided by the company, employers should implement policies and procedures, or update existing ones, regarding the use of such devices. With respect to wage and hour laws, employers should consider a policy that prohibits non-exempt employees from performing any work outside of their normal schedule unless expressly authorized to do so. Moreover, employers should require employees who, for emergency reasons or otherwise, perform work outside of their normal working hours to record and report such work as soon as possible. This requirement helps reduce the likelihood that employees would claim they were encouraged, even if tacitly, to work "off the clock" and that the employer failed to pay them for the work.

Additionally, regardless of any local, state or federal law, employers should establish policies or safety procedures stating that using a cell phone, text messaging device or other wireless communication device for company business at any time while driving is prohibited. This may require employers to modify any existing policies or practices requiring employees to answer phones or text messages immediately. Moreover, employers should provide guidance to employees who receive a telephone call while driving, such as finding the closest safe location to stop the vehicle and then return a call or message, and mandate that activities such as checking messages, returning calls and text messaging must only be done while the car is stopped in a safe location.

The benefits of Blackberries and wireless communication devices are obvious, and employers must weigh those benefits against the risks when deciding whether to permit employees' use of them. Creating and implementing sound policies and procedures to address the use of wireless communication devices can help minimize those risks.

*This Employment Law Update is published as a service to our clients and friends. It is intended to be informational and does not constitute legal advice regarding any specific situation.*

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