

January 2011: Smart Policies for Avoiding Privacy, Wage And Hour Liability in the Smart Phone Age

1/10/2011

By Dennis Donnelly

Connectivity has become the lifeblood of business and industry as hand-held and laptop technologies increasingly span the globe, accelerate real-time communication and streamline work processes. Technological advances have allowed employers to embrace the use of modern tools—various mobile communication devices, laptops, personal digital assistants and smart phones—in response to ever-increasing productivity demands, particularly in the ever-expanding service industries.

Similarly, employees dealing with work/life balance pressures and increased employer flexibility have taken advantage of technological tools to increase their accessibility, particularly when off-site or after hours. The office or worksite has become ubiquitous. These changes in the employment landscape have caused legal commentators to worry about potential litigation stemming from the use of mobile communication devices, including claims ranging from employee privacy infringement to complaints of unpaid overtime.

In July 2009, T-Mobile employees filed suit alleging they were required to check e-mail via smart phone after hours with no additional compensation. This particular case was later settled outside of court.

On the privacy front, the U.S. Supreme Court in 2010 overturned a lower court's ruling that police officials in California violated an officer's constitutional right to privacy by accessing the text messages transmitted on his department-issued pager (*City of Ontario v. Quon*, No. 08-1332 (June 17, 2010)). Had the high court upheld the controversial decision, it would have been a major blow to an employer's right to access critical electronic business information without compromising employee privacy rights.

While the Supreme Court's decision may have temporarily discouraged a flood of similar privacy violation lawsuits, the court cautiously declined to establish a bright-line rule for employers, in part because technology continues to evolve rapidly.

This means that federal and state courts still have considerable discretion to interpret the law governing employees' rights regarding electronic communications. Accordingly, employers must proactively implement clear policies and consistently communicate expectations regarding the use of mobile devices to help protect against privacy liability. And policies need to be in place to limit exposure to overtime claims as the use of mobile communication devices proliferates.

Usage Guidelines

Since most employers permit employees to use company-provided mobile communication devices for personal use, they should establish comprehensive electronic communications policies that clearly convey the company's expectations. Incorporating these policies into employee training programs ensures that expectations are publicized and in place. More important, comprehensive electronic communications policies that are frequently reviewed, edited as appropriate and implemented in conjunction with other HR guidelines can be effective first lines of defense against potential lawsuits.

Setting Expectations

For company-provided devices, explain that the employer retains full ownership and rights of access to all electronic communications, including the ability to access and audit device content on a business necessity basis. Reviewable content should include e-mail, text messages, photos and videos sent, received or stored on the device—whether business-related or personal.

Other employee and employer expectations to set in an electronic communications policy include the following:

- If the employer reimburses employees for some or all business-related use of an employee's personally purchased electronic device, ensure that the policy establishes the company's right to similarly access any business-related content.
- Clearly and consistently communicate that employees should have no expectation of privacy regarding any transmitted content, if the employer reimburses employees for business-related use of an electronic device.
- Include a "No Abuse of Privilege Clause" clearly identifying and prohibiting harmful activities. This type of clause is intended to shield the employer from liability resulting from employee misuse, especially in situations where an employee uses the device in a manner that harms others. For example, the employer's rule should prohibit employees from transmitting profane, sexually explicit, illegal, harassing or derogatory messages, or content that otherwise disparages the employer or tends to place the employer, its products or its workforce in a bad or false light.
- Consider obtaining the employee's written authorization permitting the employer to seek reimbursement for any charges or liability incurred from the employee's unauthorized, illegal or excessive use of the device.
- Outline the consequences of failing to return company-owned devices upon separation of employment, such as deduction of all related expenses from the employee's paycheck.
- Quickly address violations and consistently enforce policies in place.
- As technology advances, regularly review and update electronic communications policies to shield the employer from legal liability.

Overtime Concerns

The once-bright line separating work and personal time has become increasingly blurred as more employees than ever find it difficult to ignore the irresistible "ding" of a new work-related e-mail received on a BlackBerry after standard working hours. Productivity demands coupled with the highest unemployment numbers in decades can create self-imposed pressure on conscientious workers to reply as quickly as possible.

Others just find it easier to resolve issues in the moment rather than waiting until the next regular workday. But the convenience of having remote work capabilities also creates an avenue for employees to assert overtime claims against the employer if working time devoted to such activities is not properly documented.

Under federal law, whether an employee is exempt from receiving overtime pay is primarily determined by the employee's annual salary and job responsibilities. Exempt employees are paid to complete the job duties, even if that means working beyond the standard 40-hour workweek.

In contrast, nonexempt employees are generally hourly employees who must be paid at time-and-one-half the regular hourly rate for all hours worked beyond 40 per week. The Fair Labor Standards Act (FLSA) provides that nonexempt employees are eligible to receive overtime pay for any time above de minimis amounts worked over the standard 40-hour workweek. Various state laws may also govern nonexempt employees' overtime rights.

Although most employers have well-established policies to ensure compliance with federal and state laws governing overtime pay, surprisingly few of these policies have been updated to protect against unexpected or unauthorized overtime incurred via mobile communication devices.

As the business and private use of mobile communication devices grows exponentially, an employer that fails to set clear expectations regarding employee use of mobile communication tools potentially exposes itself to hidden wage and hour liability. Even if the employer ultimately wins an overtime violation suit, simply defending the claim can create significant legal expenses. But litigation costs can be limited when effective policies and practices in place enable a court to dismiss the case early in the litigation.

As e-mail use expands, many workers simply find it more convenient to sync their work e-mail account to a smart phone as part of today's virtual office trend. Employers are especially vulnerable when nonexempt employees such as emergency responders, mobile-dispatched employees and technical workers require remote access to company resources. The most common problem occurs when employees do not properly document incremental time spent answering e-mail or returning work-related voice mails during personal time. This creates undocumented overtime liability exposure despite clear employer policies against working "off-the-clock" without compensation.

Any employer that fails to correct the hours of a nonexempt employee who it knows is working over 40 hours per week risks losing a claim filed under the FLSA for unpaid overtime. De minimis amounts of time to read or text mail after hours may not be the grist of a legitimate overtime claim. But conducting regular and routine work after hours using hand-held device might give rise to employer exposure to overtime claims.

Avoid Overtime Liability

Best practices for avoiding overtime liability include the following:

- Restrict business use of mobile communication devices by nonexempt employees wherever possible. And annually review those employees categorized as "exempt" to confirm that their current work and duties still warrant that status to avoid additional exposure.
- Prohibit all employees from "syncing" their work e-mail account to a personal smart phone or laptop computer without the employer's approval.
- Ensure that wage and hour policies clearly outline the parameters of approved overtime work to enable compliance with state and federal law. This may require an employee to obtain the supervisor's approval prior to working beyond the standard workday.
- Instruct nonexempt workers who require a smart phone or laptop out of business necessity to consistently log time spent working outside of the standard business day. The policy should permit the employer to verify the work performed and assess the duration and business necessity of calls or e-mails to prove or disprove overtime claims. Determine if using software that automatically captures wage and hour information directly from the

device for recordkeeping purposes is more cost-effective in the long run based on the number of overtime-eligible employees with remote access capabilities.

- Consider performing overtime audits more frequently to capture and correct timecard discrepancies more proactively.
- Avoid inadvertently encouraging nonexempt employees to work overtime. For example, encourage supervisors who work after hours to schedule e-mails for delivery during the employee's normal working hours only or to specify in the e-mail's subject line that a response is not needed until the next business day.

Fortunately, the law currently protects employers with a two- or three-year limitation on the period of overtime exposure. Two years of exposure attach in every case; three years are applicable where the government or an individual employee claimant can prove that the employer's violation was willful and deliberate.

Furthermore, courts have imposed a relatively high burden on employees to establish their entitlement to monetary damages for claims related to the use of mobile communication devices when the employer has taken protective measures by implementing comprehensive policies. Being proactive in taking protective measures is critical to avoiding employer liability in the smart phone age.

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