

BLACKBERRY TIME AND FRIENDING: TECH EXPANDS WORKPLACE, NOT ALWAYS FOR BETTER

People policies must catch up to tech's light-speed motion

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Consider this: It took 38 years for radio to reach an audience of 50 million; Facebook added 100 million users in less than 9 months.

And this: My three-year-old granddaughter can—on her own—access and play three or four game apps on her mother's iPhone.

“The new technology blurs the line between the workplace and private life”

Banks have readily adopted new technology to expand their services; speed up communications; and improve oversight and accountability for financial transactions. Likewise, bank employees—and not just the younger ones—have embraced smart phones and social media as an essential way to stay connected, access information, and be entertained.

So where's the problem?

For Human Resources compliance, the problem is that the new technology blurs the line between the workplace and private life. The word “workplace” has little meaning when airlines offer wi-fi, and texting in bed allows the spouse to sleep on while you take care of business in Brussels.

This blog addresses only some of the more obvious problems when technology expands the workplace. This is an emerging area. There is little guidance to be gleaned from employment laws drafted half a century ago, and few cases have been decided in the courts. All HR practitioners and managers can do is keep a keen eye on developments, and update our policies to respond.

Blackberry time is hours worked

The Fair Labor Standards Act (FLSA) requires payment of overtime rates for all hours worked over 40 a week, except for those executive, professional, and administrator positions which fit into defined exemptions. "Hours worked" include time spent checking or responding to e-mails, or making or receiving cell-phone calls outside the office and before or after regular hours. They include accessing the bank's intranet from home on the weekend to prepare for the Monday morning meeting, or browsing the web from poolside to see the latest FDIC rule proposals.

All these hours worked must be accurately recorded on a daily basis and signed off on by the supervisor at week's end in order to be able to calculate whether overtime is payable. In a later posting, I'll tackle the thorny subject of which bank positions are exempt from this requirement. For now, be aware that the U.S. Department of Labor is taking an ever narrower view of overtime exemptions and is stepping up Wage & Hour enforcement.

Are Facebook slurs "concerted action"?

The National Labor Relations Board thinks so. In a recent federal lawsuit, the NLRB supported an employee fired for making insulting comments about her boss on her Facebook page.

The NLRB's theory was that because co-employees were Facebook "friends" and responded to the posting, the fired employee was engaging in "concerted action" protected under the National Labor Relations Act for all employees, union and non-union.

This case settled on Feb. 7, with the employer agreeing to revise its internet policy to allow workers to discuss wages, hours, and working conditions with co-workers outside the workplace, and to refrain from disciplining or discharging employees for engaging in those discussions.

Employees using social media sites to discuss workplace issues, or even to reveal who their employer is, pose a variety of potential problems for banks: damage to the bank's reputation; disclosure of confidential information; and third-party claims ranging from defamation, negligence, and discrimination, to violations of state and federal data privacy laws.

Make sure your technology policy has a section on social media use. The policy should remind employees that the bank's code of conduct applies to off-duty conduct including their Facebook postings.

Telecommuting

Technology enables working from home. Often, an employee seeking an accommodation under the Americans with Disabilities Act, or who has exhausted their paid sick leave but is not yet fit to return to full-time work at the bank, may request to work from home. While telecommuting is a boon in some industries, it may not be appropriate in many banking positions. In addition, it poses some issues with regard to the bank's supervision and control of the work performed.

Even if the bank provides the home computer and restricts its use to just the employee for bank purposes, telecommuting poses vulnerabilities in access to the bank's server. If telecommuting is going to be allowed, have a clear policy that sets out expectations with regard to dedicated space and time for work, and rules for equipment use.

And remember, just because a disabled employee asks to work from home as an accommodation, it doesn't mean it is a "reasonable" accommodation, or that you can't come up with another one that fits the bank's needs better, and still allows the employee to perform their job.

Final word

HR professionals and others with responsibilities over people have to stay ahead of the tech curve. Yesterday's technology policies, which focused on the employer's equipment ownership rights and blocking or limiting internet usage, no longer work in today's environment.

Technology has changed and societal trends have followed, with the result that the line between personal time and professional time has become blurred. Use the dual weapons of policies and training to stay ahead of the tech curve. Make sure your code of conduct addresses off-duty conduct, and makes clear confidentiality obligations. Conduct annual training regardless of whether there have been policy updates, and get participants to sign off each time.

About the author:

Marian Exall (marian.exall@gmail.com) is an employment lawyer and HR professional with 25 years' experience advising banks and other employers on compliance issues. She is a principal and co-founder of Employment Law Compliance, Inc. which provides HR compliance solutions to banks exclusively through the American Bankers' Association. She is a frequent speaker and writer on human resources compliance in the banking industry, including in ABA Banking Journal, on ABA Telephone Briefings and at national and state bankers' association conferences.

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New ABABJ.com blogger to speak at Feb. 23 ABA HR telephone briefing

President Obama's ambitious agenda of employment law reform was derailed by healthcare reform and the economy. Now Congress is deadlocked. Does this mean no new HR compliance challenges? No such luck! The focus now shifts to federal agencies and their newly aggressive attitude to enforcement and rulemaking around existing employment laws. On Feb. 23, blogger Marian Exall of "The Human Element" blog joins attorney Steven Greene and ABA's Cris Naser for a two-hour telephone briefing, "HR Compliance Challenges Continue Growing."

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