

COUNSELOR'S CORNER

# Managing Risks in the Electronic Workplace

By Mark H. Dellinger, Esq.



Tech devices, such as iPhones, Blackberrys, Droids, iPads and cell phones, are allowing businesses to increase productivity and operate more efficiently. While this new technology presents many benefits, it also poses significant legal challenges. Accordingly, it is imperative for employers to adopt clear, written policies that mitigate any

potential liability. This article briefly discusses three challenges employers now face as a result of this new technology, along with policies that can be implemented to minimize their liability exposure.

## Texting and Driving

Texting while driving has recently emerged as a major public safety issue. On the federal level, President Obama has signed an executive order banning federal employees from engaging in text messaging while driving government-owned vehicles, using government-supplied electronic equipment or while driving privately owned vehicles while conducting government business. The order also encourages federal contractors and others doing business with the government to adopt this type of policy. Meanwhile, the Occupational Safety and Health Administration (OSHA) has officially declared texting while driving a workplace hazard and an OSHA violation. OSHA's action follows many states that have already enacted bans on texting while driving. Indeed, during West Virginia's 2011 legislative session, a bill banning texting while driving (H.B. 2555) was considered by both houses before it died at the end of the session. Given these recent developments, employers should consider establishing a "distracted driving" policy. Such a policy should state that employees are prohibited from e-mailing, texting or using any type of handheld device while operating a company or personal vehicle for a business purpose.

## Textual Harassment

Textual harassment is yet another workplace headache for employers. There are a growing number of lawsuits and employee complaints involving offensive text messages. To address and prevent textual harassment, employers need to implement a clear electronic communications policy for their workforce. A good policy will address multiple aspects of electronic communication, including harassment and privacy issues. Some issues to consider when drafting

such policies are: describing the forms of electronic communications that are covered by the anti-harassment policy; prohibiting all forms of electronic harassment, whether based on sex or any other legally protected characteristic; requiring all employees to report any textual harassment; informing employees that they have no expectation of privacy over the company’s electronic communication systems, which will be monitored by the employer; and reiterating that employees can be disciplined, up to and including termination, for inappropriate use of electronic communications.

### Potential Overtime Liability

An employer is responsible for controlling the “after-hours” use of technology by its workforce. The use of tech devices by non-exempt employees is a hot topic right now in the labor and employment arena. The U.S. Department of Labor has arguably enabled these claims by launching DOL-Timesheet, which is a smartphone application (app) designed to “help employees independently track the hours they work and determine the wages they are owed.” The app is available in English and Spanish and allows users to track regular work hours, break time and any overtime hours for one or more employers. A new wave of lawsuits may be developing on the theory that non-exempt employees who use smartphones and tech devices to send and respond to work-related e-mails after hours should

be paid for that time. To protect against these lawsuits, employers need to create and enforce written policies regarding the use of technology outside of normal working time. Some elements to include in those policies are: limiting the amount of time non-exempt employees can spend using these devices outside of normal working hours; requiring non-exempt employees to receive permission before using these devices after normal working hours; and requiring non-exempt employees to report all working time outside of normal working hours.

In conclusion, as new forms of technology emerge, employers must be vigilant in modifying their policies to account for appropriate usage of tech devices. When implementing the types of policies discussed in this article, employers should obtain written acknowledgements from their employees and conduct training on acceptable norms of workplace conduct. These steps will enable employers to effectively manage the risks posed by new technology in the workplace. **MSM**



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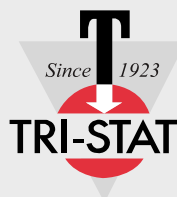
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