



## BLACKBERRYS CAN LEAVE EMPLOYERS FEELING BLUE

Without guidelines, mobile device use can lead to employee claims

By ALISON L. MCKAY

Images of candidate Barack Obama typing away on his BlackBerry were commonplace during the 2008 presidential campaign. Following his election, the question quickly turned to whether he was going to be permitted by lawyers and the Secret Service to keep his BlackBerry or to use some other similar device.

Ultimately, the president won the fight and he's using a device similar to a BlackBerry to stay connected with senior staff, close advisors and friends. The president, however, needed to agree to some severe restrictions. Specifically, he needed to agree to use a "specially made device approved by national security officials." Additional restrictions include giving only a "select circle of people" his address, having those individuals be briefed by the White House counsel's office on proper protocol and making it so messages from the president can't be forwarded.

Employers can learn valuable lessons from these types of restrictions. While mobile devices allow employers to be connected to employees 'round-the-clock, this benefit is not without risk to the employer. The risks include liability for an employee's motor vehicle accidents and workers' compensation and overtime claims. This article discusses those risks, how courts have addressed them (or might address them in the future) and provides guidelines for how employers can minimize the risks by having appropriate policies in place.

### Tortious Use

The common-law doctrine *respondent superior* holds employers liable for the wrongful

acts committed by employees acting within the course and scope of their employment. There are a number of ways an employee can use the mobile device in commission of a tort that would render an employer ultimately liable.

The most common example is the employee who uses a mobile device while driving and is involved in an accident. What happens when the employee is driving on non-work related business and receives a work-related telephone call, e-mail or text message? Use of the mobile device while in the course of driving alone is not sufficient to hold an employer liable. If a jury finds, however, that the employee was driving while conducting work-related business through a mobile device and that was the cause of the accident, the employer may be found liable.

What can an employer do to reduce or minimize such risks? Employers should include provisions in employee handbooks that prohibit employees' use of BlackBerry-type devices and cell phones while driving. Some courts have declined to impute liability to employers through *respondent superior* when the employer's handbook specifically precludes conduct that resulted in the tortious act. Other courts, however, treat the doctrine of *respondent superior* as a doctrine of strict liability and allow liability even when an employee was acting contrary to specific instructions of the



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employer. Thus, depending on what state's laws apply to a particular set of facts, the policy may or may not shield the employer from liability.

If precluding employees from using the device while driving is not a realistic solution, the employer should at the very least require that the employee use a hands-free device or to simply adhere to the laws of the state in which the employee is driving. Many states already have laws that require using hands-free devices for drivers.

### Workers' Comp Claims

Another possible risk to employers is a workers' compensation claims for injuries an employee sustains while using a BlackBerry or other mobile device to conduct an employer's business.

The first example is the employee who is involved in a car accident during non-work related travel in which he or she used their mobile device for work-related purposes. Merely using the device during non-compensable motor vehicle travel will not result in a compensable claim for workers' compensation benefits should the employee's driving cause an accident. However, if the employee is on the cell phone conducting business for the employer at the time the accident, that may increase the chance that an employee may be successful in his or her claim for workers' comp benefits. It should be noted, however, that some courts have declined to award benefits even when the employee is using the mobile device for work-

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related business at the time of the accident. By adopting policies in the employee handbook precluding the use of the mobile device while driving or otherwise restricting such use, an employer can strengthen his or her defense of this type of claim. The position is strengthened because the employer is better able to argue that the employee using the mobile device in a manner expressly prohibited by the employer was acting outside the course and scope of his employment.

Another way that the use of a mobile device might result in employee injuries is what has been called "BlackBerry Thumb," a repetitive stress injury recognized by hand therapists and the American Physical Therapy Association. Avoiding this type of claim is more difficult because the risk cannot be minimized or eliminated by including policies in an employee handbook. Instead, the prevention requires that the employer be aware of the potential for claims. By doing so, an employer is likely to see or hear of potential claims before they ever turn into actual claims and work out alternative solutions which prevent actual claims from being filed.

For example, when an employer or supervisor hears an employee complaining of thumbs aching from excessive use of the mobile device, the employer can provide a portable keyboard or suggest ways for the employee to accomplish the tasks at hand without depending on the mobile device.

### **Overtime Claims**

Whether providing employees who are non-exempt under the Fair Labor Standards Act with BlackBerry-type devices will lead to increased wage-and-hour litigation has been a

subject of debate. To date, however, there has not been a major influx of litigation. There have been a few claims that attracted attention, however.

One case involved ABC and the Writers Guild of America. A dispute arose between ABC and its non-exempt writers who were each provided with a BlackBerry. ABC and the Writers Guild disagreed as to what type and amount of work performed after-hours through use of the BlackBerry was compensable. Ultimately, the matter was resolved without litigation.

In another case, a Verizon Communications Inc. personal account manager filed a wage-and-hour lawsuit. She alleged that Verizon required personal account managers to work 72 hours a week through use of a BlackBerry and compensated these managers for only 40 hours. The suit is in the early stages of litigation, and it remains to be seen whether any of the individual plaintiffs or the class as a whole will prevail in their claims.

The limited number of claims of this type may be due in large part to the fact that most employees who are issued BlackBerry or similar devices are exempt from overtime pay. Notwithstanding, it would serve the interests of all employers to routinely review employee classifications. The employer should pay particular attention to the actual duties that each employee does daily rather than focus on the title. The risk of claims is greatest for an employer who has misclassified a non-exempt employee as exempt and issues that employee a BlackBerry. Wage-and-hour claims against employers who misclassify employees are prevalent, often resulting in large collective actions against large employers.

In addition to reviewing employee classifications, employers should be careful when issuing a BlackBerry or similar device to non-exempt employees. When that does happen, employers should set clear policies governing the device's use, including when the employer is expected to use the mobile device and when he or she is not supposed to use it. The employer should recognize that requiring employees to check e-mail after hours will require that employees be compensated for the overtime incurred. If an employer does not require that employees check e-mail after hours, that should be made clear. Also, the employer's policies should state that no overtime will be paid absent prior approval from a supervisor.

Setting that policy alone will not be sufficient to shield the employer from potential claims, however. Under the Fair Labor Standards Act, an employer must still compensate employees who work overtime without permission. The law does, however, permit an employer to discipline employees for disobeying the employer's policy.

### **Conclusion**

A BlackBerry or other mobile device is an extremely useful tool for employers that need to keep in constant touch with employees. As the president's lawyers and the Secret Service have advised him, however, the use of such a device comes with risks. In most circumstances, the benefit to the employer outweighs the risks. Notwithstanding that, every employer should carefully review and weigh those risks for each employee and place appropriate restrictions on the use of the mobile device before issuing it. ■