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THE ANYWHERE OFFICE = ANYWHERE LIABILITY

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THE 20TH-CENTURY office is dead. According to *Telework Trendlines 2009*, WorldatWork's new survey of more than 1,000 U.S. adults, the number of Americans working remotely at least once a month jumped 39%, from 12.4 million in 2006 to 17.2 million in 2008 (Dieringer Research Group, 2009). Last year Congress even introduced bills that would encourage and expand telework programs in the federal government (WorldatWork, 2009). Although the disappearing office boundaries caused by technological advances have obvious benefits for employers and employees, something else is dissolving along with those cubicle walls: clear limit lines of employer liability.

Human resources personnel and employment lawyers currently report a variety of fresh legal oddities now that the “anywhere office” is becoming the norm. Expanding areas are traditional theories, such as scope of employment, and overtime compensation when companies give portable communication or data devices to their employees, keeping them connected 24-7 like an electronic umbilical cord. Moreover, employers must not ignore the confidentiality concerns raised by these devices or the extension of workers’ compensation coverage to the home office either—the courts certainly are not. By reviewing the legal trends emerging from these broad categories of “anywhere” liability, employers can anticipate exposure and develop policies to minimize it.

After-Hours Business Communication

An unintended consequence of company issued smartphones is the possibility of overtime exposure when these devices are used after-hours. A recent WorldatWork survey reveals that employees view receiving a company smartphone as a double-edged sword (Marquez, 2009). One third of employees questioned see these as rewards, and half felt that these devices signified their status or importance at the company. At the same time, 42% surveyed believe that by getting the devices, their boss expects them to be available always, with three out of four saying they “never turn theirs off” (Marquez, 2009). With employees constantly plugged in, overtime liability issues cannot help but surface.

Imagine this scenario: An employer gives her assistant, paid less than \$27.63 per hour, a company smartphone and contacts him at home on a Saturday when she cannot find a document. The assistant uses the phone to reply with the necessary information. Is he entitled to overtime pay for that work? According to Andrew Levey, an attorney with Paramount Pictures Human Resources, the answer is most likely yes (personal communication, February 9, 2009). Levey (personal communication, February 9, 2009) confirms that “BlackBerry time” after work hours is treated the same way as traditional overtime. Thus, the Fair Labor Standards Act (FLSA), which regulates wage and hour law, requires two things in this situation: (a) the company must pay the assistant for time worked in the smallest

increment allowed by its payroll system and (b) the assistant will be entitled to the overtime rate if he has already completed a full workweek (A. Levey, personal communication, February 9, 2009).

The amount of time worked on the wireless device is the key to determining overtime liability for hourly employees. According to the FLSA, an employer is not responsible for paying employees for small amounts of time that are insubstantial or insignificant. This is called the *de minimis* standard (Kalish & Traub, 2008). “When the matter in issue concerns only a few seconds or minutes of work beyond scheduled working hours, such trifles may be disregarded,” reasoned the court in *Reich v. New York City Transit Authority* (1995, p. 652). Thus, an hourly employee who merely checks a few emails would probably not be entitled to overtime pay; but if that activity stretched to 10 minutes or more, the *de minimis* standard most likely will be exceeded, triggering compensation.

FLSA collective actions now outnumber discrimination class actions in federal court. Meted out in these courts, the potential consequences for an employer’s failure to pay overtime extend beyond payment of the wages themselves to criminal penalties, liquidated damages, attorney’s fees, and equitable relief (FLSA, 2008). To prevent these hazards, companies need to create and enforce strict policies, like the accounting firm Ernst & Young did. Their policy states that employees are not expected to look at their email on weekends (Marquez, 2009). Similarly, ABC Broadcasting recently reached an agreement with its employees compensating them for overtime when they do “substantial work” on their BlackBerrys, but that work does *not* include routine checking of email (Kalish & Traub, 2008). Employers should also consider policies that allow issuance of mobile devices only to employees exempt from overtime or that require nonexempts to use them only for *de minimis* amounts of time (Kalish & Traub, 2008).

The Company Car

Employers generally are liable only for the torts their employees commit within the scope of employment. Traditionally, an employer was not liable for auto accidents that occurred while an employee was driving to or from work unless the employee was running a special

errand for the employer. Now, because of the blurring line between personal and professional lives when a company car is in use, courts hold employers liable more often for employees' accidents, regardless of whether the employee is actually performing any work-related tasks at the time the accident occurs (Wilson & Graham, 2008). In these cases, courts are *presuming* that the accident occurred within the scope of employment and are requiring the employer to rebut this presumption to escape liability. Even minimal evidence showing that the employer has benefited in any way from the employee's use of the vehicle may limit the employer's legal options (Wilson & Graham, 2008). Thus, employers providing employees with access to a vehicle should adopt policies to minimize their liability, such as charging the employee for any personal use of the vehicle or simply prohibiting its use for any personal purpose (Wilson & Graham, 2008).

The Company Cell Phone

Employers might also face liability where an employee has a company-issued cell phone or pager present during an accident. Different courts have come to widely different conclusions regarding an employer's liability for such accidents. In the most obvious of these cases, a court found an employer liable when it provided an employee with a cellular phone, the employee had an accident while driving and using the phone, and the employer had no clear policy against this (Wilson & Graham, 2008). However, some courts have gone much farther in holding employers liable. One court upheld a jury verdict finding employer liability for an intoxicated employee's car accident because the employee happened to have his company provided cellular phone and pager with him when the accident occurred. This was despite any evidence that the employee was responding to either a page or call, performing any work-related task, or benefiting his employer in any way by his actions (Wilson & Graham, 2008). In another case, an employee gave out his personal cellular phone number to his coworkers for work-related calls and was involved in an accident at the same moment a coworker was calling. Even though the employee did not answer the phone, the court sent the case to trial, deciding that the coworker's call at the time of the accident might have distracted the employee, possibly bringing the accident within the scope of employment (Wilson & Graham, 2008).

Although frequent contact with employees is often desirable or convenient, employers should strongly consider providing mobile devices only when actually necessary. Policy should make clear that the employee must turn off the mobile device or place it in silent mode while driving, to avoid being distracted. A complete ban on the use or possession of phones or pagers while driving is warranted, particularly in light of the recent spate of state laws prohibiting such mobile device use in a vehicle (Governor's Highway Safety Association, 2009).

Portable Storage Devices

Office files no longer exist solely in corporate buildings; they are now accompanying employees as they commute, relax at home, travel overseas, and so on. Not only are laptops, USB drives, and PDAs being loaded with sensitive data, but these portable devices are also frequently lost or stolen, leading to myriad legal claims and harm to the company through confidentiality breaches. Alan Raul, an attorney specializing in privacy and information security issues with the law firm Sidley Austin, argues the potential is also there for remote workers to expose sensitive data to hackers by sharing work laptops with family members at home (Frauenheim, 2008). Aiding the growing awareness of this data breach liability from a consumer perspective is a set of state laws on notification in such circumstances. California was first in the nation in 2003 with its Civil Code § 1798.82 (recently amended in 2008). Under this law, a business that maintains unencrypted computerized data that includes certain personal information must notify any California resident “whose unencrypted personal information was, or is reasonably believed to have been, acquired by an unauthorized person” (California Civil Code § 1798.82, 2008). Now, all but six states have similar law (exceptions are Alabama, Kentucky, Mississippi, Missouri, Nevada, and South Dakota).

These notification laws have forced attention toward a number of high-profile cases involving lost or stolen employee data. Among the most public of these messes are the various U.S. Department of Veterans Affairs (VA) incidents: a 2008 theft of three computers from an Indianapolis VA medical center containing information on

12,000 veterans and a May 2006 theft from a VA employee's home of computer equipment that included personal data for as many as 26.5 million veterans and other individuals. Union Pacific also acknowledged a series of eight data breach incidents between April 2006 and January 2007, most of which involved stolen laptop computers containing personal information for 35,738 current and former Union Pacific employees from across the United States. Those breaches gave rise to three lawsuits (Frauenheim, 2008). Beside including routine encryption on portable devices, companies should set policies for acceptable remote computer usage as well as ask tough questions about whether sensitive data truly needs to be taken home (Frauenheim, 2008).

Workers' Compensation Coverage

Generally, the "course of employment" component of workers' compensation recovery has two requirements: (a) the act causing the injury must have occurred during the time and at the place of employment and (b) the activity must be related to the employment in some way. *Wait v. Travelers Indemnity Co.* (2007), a recent Tennessee case, provides a better understanding of how telecommuting fits into this test for purposes of workers' compensation coverage. While on a lunch break at home during normal work hours, a neighbor who plaintiff-employee Wait had admitted into her home assaulted her. She filed for workers' compensation, claiming that her injury arose out of and occurred in the course of her employment. Wait worked for the American Cancer Society (ACS) out of her home office, holding meetings there with her supervisor and coworkers and using office equipment provided by ACS.

With the advent of telecommuting, satisfying the "place" requirement of the workers' compensation test means that plaintiffs, like Wait, must show that their home actually served as a place of employment or should be considered work premises (Schenk, 2009). The *Wait* court stated that "an employee telecommutes when he or she takes advantage of electronic mail, internet, facsimile machines and other technological advancements to work from home or a place other than the traditional work site" (*Wait v. Travelers*, 2007, p. 225). The plaintiff's status as a telecommuter and her home office's classification as work premises were obvious and uncontested here, and the

Tennessee Supreme Court found that Wait's injury *did* occur during the time and at the place of employment. However, the Court held that the injury was noncompensable because it did *not* "arise out of the employment" (Wall, 2008, p. 24). In Tennessee, an injury has to be connected with work or be caused by work activities to satisfy this second prong of the liability test. The court did not find that nexus here: Work activities did not cause Wait's injury, nor was her attacker a coworker or supervisor. Experts agree that after this decision, the courts will regularly apply workers' compensation law to telecommuting injuries, but much is yet to be determined regarding satisfaction of the "place" test in circumstances less clear than Wait's (Schenk, 2009).

Conclusion

The more situational freedom employees enjoy, the more liability follows their natural proclivity to blend business and personal activities, using company gadgets or vehicles while exercising that freedom. Ultimately, controlling liability comes down to best practices in policymaking. As emphasized by Phil Montero (2009), author of a website devoted to anywhere workers (www.theanywhereoffice.com), "'You can work from anywhere' doesn't mean you should work from everywhere, all the time." If employees understand when, where, and how much work employers expect from them off site, they are less prone to become liabilities. It is up to employers to draw the line between work and home—clearly, in writing, and signed by the employee. Time will tell whether the "anywhere office" trend perpetuates the legal evolution currently witnessed or whether employers pull back on the employee leash after successive legal bites. Although policies should be written and enforced to cover some resulting liability, the simple fact is that employers must be willing to bear some risk for employee actions when those employers ask to be brought literally "anywhere" with their workforce.

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