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PRIORITY Read

Bring Your Own Device: Pitfalls and Practical Advice

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In this technology-driven era, employees increasingly use their own devices, especially smartphones and tablets, to perform work-related tasks. When managed effectively, this trend—commonly known as "bring your own device" or BYOD—benefits both employers and employees. Employers achieve a significant cost-savings by not having to purchase devices but still maintain a responsive and productive workforce. And employees can stay connected to work and carry the most up-to-date mobile devices without having to carry around more than one device. With the ever-increasing reliance on mobile devices, the BYOD trend is undoubtedly here to stay.

Yet, along with these benefits, BYOD brings risks and dilemmas that all employers must address.

Post-Employment Protection. Many employers protect themselves after the employment relationship ends by requiring employees to enter into nonsolicitation and nondisclosure agreements. Under these agreements, employees promise to return all employer property, not use or disclose the employer's confidential information, and not solicit the employer's customers or other employees. If an employee brings his (or her) own device to work, however, he could almost certainly walk out the door with information that can be used to circumvent such agreements and harm the employer.

Data Breaches. Seemingly every month, there is another national news story about a serious security breach at a major banking institution, retail outlet, or technology provider. Yet individuals almost invariably take fewer precautions to ensure that their personal devices contain the most up-to-date security measures. This data may be dropped into third-party servers, such as the iCloud, which are susceptible to hacking and other cyber-attacks.

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Down to Earth. Down to Business.

Bring Your Own Device, *continued*

This is problematic because BYOD enables employees to have confidential data about their employer, customers, patients, etc. on their device. It can be even more problematic for certain types of employers—such as health care and financial institutions—because of their additional legal obligations to protect certain types of information.

Employer Monitoring. With employer-owned devices, the employer is unquestionably entitled to monitor use of the device and ensure that it is secure and that the employee is using the device only for appropriate purposes. If the employer allows BYOD, however, it is far more difficult to monitor devices. And if the employer does monitor employee-owned devices, it could be viewed as invading employees' privacy because the device will also contain personal information.

The Fair Labor Standards Act. If an employee is not "exempt" from the FLSA, the employer must pay him for all hours worked. This can cause a potential issue because BYOD enables employees to perform work after-hours. (More about this discussion in the article "Should You Be Paying Employees to Check Emails After Hours? on page 3).

There are, however, a number of practical steps that employers can take to minimize these potential risks.

BYOD Policy. By far the most important step an employer can take to protect itself and minimize risk is to establish, implement, and enforce a BYOD policy. This policy should define the scope of permissible use for employee-owned devices and can be included in the employer's handbook. The policy will also allow the employer to prohibit the employee from using the device for improper purposes, e.g. harassment, violations of state or federal law. The policy should remind employees that certain states have restrictions on using a mobile device while operating a vehicle. The policy should also inform hourly employees that they are not to work after-hours and, if they do, they must report that work to the employer.

Consent. As part of the BYOD policy, the employer should gain the employee's consent to access the device for business-related purposes. This consent should clearly convey to employees that they cannot expect privacy on their device if they use it at work because the employer may need to access personal information to ensure the employee's compliance with legal and contractual obligations.

Security. While no one can guarantee total security, the employer's policy should require employees to maintain certain security measures to keep up with best practices for protecting devices. This includes requiring employees to maintain password-protected devices, download the most up-to-date security measures, and prohibit third party access to the device.

IT Wipe. The employer should also obtain the employee's consent to "wipe" the device of any confidential data when the employee separates from the employer. This will enable the employer to better protect its interest and ensures that the employee complies with any contractual or legal obligations after the employer no longer has access to the employee or his device.

Because the use of employee-owned devices is certain to increase in the coming years, employers should take action now to ensure that they can receive the benefits and minimize the risks associated with BYOD.

If you are considering implementing a BYOD policy, contact your labor and employment attorney to discuss the most effective method of doing so.

Should You Be Paying Employees To Check Email After Hours?

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According to recent research conducted by the Pew Research Internet Project, as of January 2014, 58 percent of American adults have a smartphone and 42 percent own a tablet computer. Time spent on mobile devices by the average American consumer currently hovers around 2 hours and 42 minutes per day. For many, much of that time is undoubtedly spent checking and responding to work-related emails. Do employers need to pay employees for time spent after hours reviewing and responding to work-related emails?

The Fair Labor Standards Act (FLSA) requires covered employers to pay non-exempt employees for all hours worked. Covered employers are also required to pay non-exempt employees time and a half for all hours worked over 40 per week. Generally, "hours worked" includes all time that an employee must be on duty, on the employer's premises, or at any other prescribed place of work. Also included, however, is additional time that an employee is "suffered or permitted" to work.

Under some circumstances, time spent after hours reviewing and responding to work-related emails may qualify as time that an employee is "suffered or permitted" to work. For example, if an employer specifically asks employees to check emails after hours, the time spent doing so will qualify as hours worked. Such time may also constitute hours worked even if the employer does not specifically ask employees to perform the task. Indeed, merely knowing that an employee is checking emails after hours and allowing the employee to do so may be sufficient to impose wage liability.

What if the time an employee spends checking emails after hours only amounts to thirty seconds? Or two minutes? Courts have acknowledged that compensating employees for a few seconds or minutes of work beyond scheduled working hours is impractical. As a result, employees cannot recover for otherwise compensable time if it is *de minimus*. While this exception is certainly helpful to employers, sometimes it can be difficult to know exactly when working time moves from *de minimus* to compensable.

The failure to properly count and pay for all hours that an employee works may result in a minimum wage violation if an employee's hourly rate falls below the required minimum wage when his or her total compensation is divided by all hours worked. Further, the failure to count all hours worked will result in an overtime violation when hours worked in excess of 40 hours during the workweek have not been fully accounted for.

There are a number of precautionary measures that employers can take to reduce potential wage liability for after-hours time spent checking emails. For starters, if business necessities do not require after-hours emailing, employers should implement a policy prohibiting such conduct. In addition to implementing such a policy, employers need to actively enforce the policy by monitoring after-hours email usage or employing other technological means to rule out such usage (e.g., by restricting access to email after hours) and imposing consequences for violating the policy. Finally, where business necessities require after-hours emailing, or where an employer has suffered or permitted employees to check emails after hours, employers need to ensure that employees are reporting all hours worked, compensate employees for all hours worked, and pay overtime where required.

If you have any questions about this issue, you may contact the authors. If you have any questions on FLSA and wage and hour, please contact your employment law attorney.

Favoring Tech-Savvy Workers in a Digital Age

By: Mary L. Tabin; tabinm@millerjohnson.com; 616.831.1753
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Have you ever read *Future Shock?* In it, author Alvin Toffler predicts employers will be forced to constantly refine, reevaluate, and innovate new ways to utilize technology in the workplace in order to keep pace with competitors. In turn, this will require employees to develop robust and flexible technological proficiencies. Although *Future Shock* warned about a technology skills gap back in 1970, employers still struggle with cultivating a workforce that embraces and capitalizes on technology.

The pressure on employers to increasingly incorporate more technology into its workforce also impacts them in another way—the ADEA. Enacted in 1967, the Age Discrimination in Employment Act prohibits employers from discriminating against an employee on account of that employee's age. The Act's stated purpose is to eliminate the impact of age-related prejudices with respect to employment decisions and to "promote employment of older persons based on their ability rather than age." But how does the Act impact employers that need employees adept at handling the cutting edge of technological innovation? Does the law view an employer's requirement of technological proficiency as a basis for age discrimination?

Continued on next page.

We're Honored

Best Lawyers

Recently, **David Buday** and **Mary Bauman** were honored to be named as Lawyer of the Year by *Best Lawyers*. Fourteen Miller Johnson attorneys whose practice focuses on employment, employee benefits and labor were also selected by their peers for inclusion in *The Best Lawyers in America*® 2015.

The other Miller Johnson employment and labor attorneys who are *2015 Best Lawyers in America* are: **Gary Chamberlin, Tony Comden, Bill Fallon, Jeff Fraser, Peter Kok, John Koryto, Craig Lubben, Jon March, Craig Mutch, Peter Peterson, Nate Plantinga** and **Mary Tabin.** Also, **Frank Berrodin** and **Jim Bruinsma** are recognized for Employee Benefits Law.

Super Lawyers

Super Lawyers has included five Miller Johnson attorneys on their 2014 list for Michigan in the Employment and Labor practice area. They are: **David Buday, Tony Comden, Bill Fallon, Jeff Fraser** and **Peter Kok.** For the practice area of Employee Benefits/ERISA, they have honored **Mary Bauman, Frank Berrodin** and **Jim Bruinsma.**

Tech-Savvy Workers, *continued*

Thankfully, the answer is "no." Although older employees may feel at a disadvantage because they did not grow up with iPhones, iPads or perhaps computers, a technological proficiency job requirement is not *by itself* discriminatory. Courts have held that technological advancements can appear to favor the younger generation, but only if one presupposes that older workers are more resistant to change and are adverse to learning new electronic methods. Ironically, this is the very type of ageist stereotype that the ADEA was enacted to address. Requiring certain computer skills to obtain a job or retain one (even if the employee was proficient at his/her job before the electronic skill set was added) does not amount to age discrimination.

Going forward in your technologically proficient workplace, employers should remember the following:

As always, document performance issues … Even if an older worker's technological difficulties render him or her completely unqualified for a position, that employee could argue he is Bill Gates (age 53, by the way) if those performance issues are not carefully documented. Moreover, if your company places a priority on documenting employees' technological limitations, that process can help age-related prejudices from becoming conflated with reality.

… but try to scrutinize all employees equally. At the same time, don't analyze older workers' technology skills with a microscope and turn a blind eye to younger employees' performance. This degree of disparate treatment could lead to a lawsuit.

Focus on the qualifications, not on the age. If a particular job requires the use of certain computer software or any electronic device, require all employees to be proficient in using that software or that device. Employers may set their own acceptable employment standards and courts will generally not interfere with this analysis—just make sure that your inquiry is centered on *technological proficiency*, not on age.

If you're going to enforce technological proficiency standards, enforce them as uniformly as possible. Problems may arise when an employee is terminated for inadequate technological skills but the employee can identify co-workers who were hired or retained despite lacking the same qualification. This might make it appear as though the stated job qualification is merely an excuse to conceal an illegal reason behind a discharge, a refusal to hire, or a refusal to promote. An aggrieved employee could argue that this illegal reason is his or her age.

Even if an older employee has demonstrated limitations with technology, do not assume that training will be futile. "You can't teach an old dog new tricks" might be a familiar idiom, but it is bad HR policy. If an older worker is exhibiting problems utilizing new technology, that employee might benefit from additional training or job coaching. If his or her performance improves, your company benefits by retaining an experienced employee who is now able to capably perform new job functions. If his or her performance does not improve, your documentation of your company's attempt to train this individual will be useful evidence that technology skills are actually valued and needed for business operations.

If you have any questions about the article or the ADEA, please contact the authors.

Technology Today

This issue of the *Priority Read – Employment Law Update* is focused on technology. From hardware (BYOD) to applications (email and social media), we strived to provide "news you can use." We focused on how technology interfaces with HR practices such as wage and hour, harassment, nondisclosure agreements, discrimination and documentation.

Social Media: Virtual Harassment with Real Workplace Consequences

By: Gregory P. Ripple; rippleg@millerjohnson.com; 616.831.1797
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Over the last several years, social media usage has exploded. While social media is often associated with millennials, some statistics indicate that 75 percent of all internet users are active on social media. While 9 out of 10 employees under the age of 30 are social media users, older employees are not far behind: 3 out of 4 employees in the 30-49 age brackets are active social media users and 6 out of 10 employees in their 50s are logging onto social media sites.

Far from being a phenomenon restricted to the youngest generation of your workforce, these statistics demonstrate that a majority of your workforce is using social media to communicate with friends and co-workers. And, increasingly, employees are accessing their social media accounts from mobile devices and at work.

While most social media use is healthy and acceptable, when employees stop using their social media accounts to share family photos and thoughts about the latest TV show or football game and begin using their social media accounts to harass or threaten co-workers, social media can become an HR nightmare.

It should come as no surprise that employees can use social media to harass co-workers. After all, social media is just another form of communication. In essence, social media communication is no different than other types of communication. Inappropriate or harassing comments are unacceptable in any form, whether delivered in person, by telephone, in an email, or on Facebook or Twitter.

Social media communications, however, pose challenges for Human Resources professionals. Like email, social media posts are usually in writing which means they leave a "paper" trail that can be used as evidence against an employer. Social media posts, like anything on the Internet, are generally public and hard to erase. No matter the privacy settings of the user, once a comment or picture is posted to a social media site the original poster loses control over the post. We have all seen "viral" social media that were designed to be shared with only a few friends.

Harassment through social media, moreover, can take place outside of normal working hours. Employees may post harassing comments or posts on social media sites during breaks or before and after work. This off-duty conduct can spill over into the workplace. Many employers believe that they are not responsible for employee harassment that occurs outside the workplace and not allowed to discipline employees for behavior that they engage in outside of work. Both beliefs are incorrect.

Employers have a duty to prevent and address harassment in the workplace. Inappropriate social media posts made by one employee about another can contribute to a hostile working environment, especially if such posts are shared with co-workers or become the subject of discussion at work. The employer may be held liable in such a situation if the harasser was a supervisor or if the employer fails to take prompt remedial action when it learns of the harassment.

Employers should update their anti-harassment and social media policies to include behavior that occurs online and on social media sites. It is up to each employer to decide what they specifically want to include in these policies. However, we recommend that employers consider updating such policies to state:

- use of blogs, social media sites or other internet communication to harass other employees is strictly prohibited;

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Social Media Harassment, *continued*

- this prohibition applies to conduct outside of the workplace, if sufficiently connected to employment; and

- employees found to be harassing co-workers via the Internet can be disciplined, up to and including termination, regardless of whether the harassment takes place in the workplace or elsewhere.

Social media is an ever-changing forum and policies addressing employee conduct online may become quickly outdated. Therefore, we recommend drafting these policies broadly so as to be easily adaptable to the changing environment. Having a strict policy forbidding harassment via social media is an important step in limiting employer liability in this popular and ever-changing landscape.

If you have any questions about the article, contact the authors. If you want assistance with reviewing or updating your policy, please contact your Miller Johnson employment attorney.

Save the Date

Miller Johnson's Annual Employment Law Seminar

Our Employment Law Seminar provides practical solutions to your employment and labor law questions. In the two breakout sessions, there are 12 choices on the following topics:

- Generational Workforce Issues
- New Workplace Culture of Activism
- Workplace Technology: The New Addiction
- Preparing for IRS and DOL Audits of Retirement Plans
- Going Global
- Federal Contractors Under Siege

Additional sessions provide updates on the FMLA, Wage and Hour, Affordable Care Act, NLRB, OSHA, and Discrimination Law.

Registration is open for both **October 14** in **Kalamazoo at WMU's Fetzer Center** and **October 30** in **Grand Rapids at DeVos Place**. You can register online at www.millerjohnson.com.

This seminar has been approved for 4.0 general continuing credit hours through HRCI and is free for current clients.

For more details, you may view the brochure on our website at www.millerjohnson.com or contact Amy McCaffrey at 616.831.1886 or mccaffreya@millerjohnson.com.

Self-Funded Health Plans to Obtain a Health Plan Identifier

By: Mary V. Bauman; baumanm@millerjohnson.com; 616.831.1704
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In an effort to reduce inefficiencies and increase automation in processing health plans' electronic transactions, Health Care Reform requires certain health plans to apply for a health plan identifier (HPID). The HPID will be used to identify a health plan when it engages in a HIPAA standard transaction, such as electronic funds transfer or electronic remittance advice. For fully-insured plans, the insurer is responsible for obtaining the HPID. For self-funded plans, the plan sponsor must obtain the HPID. The HPID application must be completed by **November 5, 2014** for large plans. Small plans, however, have until **November 5, 2015** to apply for an HPID. A "small" plan is defined as a health plan that pays less than $5 million in benefits per year. While a self-funded plan's TPA can assist the plan sponsor in applying for an HPID, the application must ultimately be submitted by the plan sponsor. The HPID is not required to be used by health plans, large or small, until **November 7, 2016**. Plan sponsors will need to use an electronic system maintained by the Department of Health and Human Services called the "Health Plan and Other Entity Enumeration System" (HPOES) to apply for an HPID. For additional information, see article "Delays at CMS May Make it Difficult to Obtain an HPID On Time" posted to our website on September 19, 2014.

Employment Section Extends Warm Welcome to Tabin

Miller Johnson is pleased to welcome **Mary L. Tabin** as a Member in the Grand Rapids office. She works with a variety of employers, in particular those in the health care industry and family-owned businesses. She provides day-to-day HR guidance in areas such as employee relations, retention, employee handbooks and employment contracts including non-compete agreements. Ms. Tabin has vast experience in counseling on issues related to discrimination, harassment and retaliation. In addition, she handles complex employment litigation.

Prior to joining Miller Johnson, Ms. Tabin worked for another law firm in West Michigan for 16 years where she was the chair of its employment and labor section. Ms. Tabin received her B.A. *magna cum laude* from Hope College. She earned her Juris Doctor *magna cum laude* from Valparaiso School of Law.

In the News

Mary Bauman gave several Affordable Care Act Updates. She presented at the Michigan West Coast Chamber of Commerce Smart Lunch. On September 18 at the Howard Miller Community Center in Zeeland. She hosted a webinar on October 9 for the Michigan Chamber of Commerce. Mary will present to the Michigan Association of CPAs on November 12 and for the Grand Rapids Area Chamber of Commerce on November 14.

Gary Chamberlin and **Mary Tabin** will be presenting a Legal Update for the Association for Human Resource Management (AHRM) on November 19 at the Calvin College Prince Conference Center.

Jeff Fraser was interviewed for the article "Family medical leave likely for Michigan's LGBT employees" in the June 30 issue of the *Grand Rapids Business Journal.* He was part of a panel exploring "The New Culture of the Workplace - Protected Concerted Activity in the 21st Century" on September 18 at the State Bar of Michigan Annual Meeting.

Jeff Fraser and **Mary Tabin** were on the "Hottest legal issues facing employers today" panel at The Employers Association (TEA) HR/Legal Conference and Annual Meeting on May 20. Jeff and Mary will also be presenting on "HR Land Mines that Lead to Legal Battles" on November 20 for TEA's Human Resource Group (HRG).

Peter Kok, Keith Eastland and **Tripp Vander Wal** presented "Union Organizing - The Perfect Storm" and more at the 1st annual Employment Law Update for ABC (Associated Builders and Contractors) Western Michigan Chapter on June 17.

Nate Plantinga was appointed to the Board of Directors for TEA's Human Resource Group (HRG) and will also be their legal counsel.

Greg Ripple authored an article and was cited in another for the National Business Aviation Association (NBAA) publication. He wrote "Federal Court: Mandatory Retirement Age for Pilots is Not Age Discrimination" which was in the May issue and he was interviewed for "IRS Tightens Scrutiny of Worker Misclassification" in the September issue.

Kelley Stoppels presented "How to Identify and Reduce Risk During Workforce Reductions" on September 12 at the 2014 Michigan Health Care Human Resources (MHHRA) conference in Lansing.

Rebecca Strauss was interviewed for the article "EEOC updates guidelines related to pregnant employees" in the August 4 issue of the *Grand Rapids Business Journal.* She was also elected to membership at the firm. On October 10, Rebecca presented "Unlocking the Hidden Potential of Job Descriptions" at the MISHRM conference in Detroit.

Mary Tabin was elected to the Board of Directors of The Employers Association (TEA) of Grand Rapids. She presented "Understanding Employment Law Issues" at the Michigan Engineering Law seminar on July 25 in Grand Rapids. Mary is also on the planning committee for the 2015 Michigan Council of the Society for Human Resource Management (MISHRM) conference which will be held in Grand Rapids.

Tripp Vander Wal was interviewed by Rachel Weick for the article "Form 5500 is late? That's $1,000 per day" in the July 28 issue of the *Grand Rapids Business Journal.* He will also be doing an update on the Affordable Care Act for the Employers Association of West Michigan in Muskegon on October 28.

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U.S. News Media Group and Best Lawyers awarded Miller Johnson with top rankings for 25 practice areas in Grand Rapids and 8 in Kalamazoo as part of their 2014 "Best Law Firms" report. Achieving a high ranking is a special distinction that signals a unique combination of excellence and breadth of expertise according to the report. Services ranked as Tier 1 include employee benefits, bankruptcy and creditor/debtor rights, corporate law, labor and employment, mergers and acquisitions, banking and finance, litigation, mediation, real estate, tax law, trusts and estates, and family law.