

## EMPLOYMENT LAW

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### IN THIS ISSUE

*A generational shift in the workforce has continued the acceleration of technological advances and has led to the rapid influx of personal use technologies in the workplace. However, employers and the attorneys representing them should be mindful of the legal implications created by the presence of such technologies within the workplace.*

## Tipping Point: Balancing Personal Use Technology in the Workplace

### ABOUT THE AUTHOR



**J.T. Wilson III** is a partner in the Chicago office of Lewis Brisbois and a member of the Employment & Labor and Transportation Practices. He handles wage and hour class action, retaliation, whistleblower, Title VII, age and disability discrimination claims on the state and federal levels. A member of DRI and the IADC, he is also on the Executive Committee of the National Association of Railroad Trial Counsel and active in the National Employment Law Council. J.T. graduated from the University of Illinois-Chicago with a Bachelor of Arts in Political Science, and obtained his juris doctor from DePaul University College of Law. In the past, he has spoken on a range of legal topics including: “Back to the Future: Bridging the Gap of Generational Differences”; “Diversity Issues: The Millennial Effect”; “Strategies to Achieve Early Resolution of Employment Claims, Charges and Suits”; “Caring for the Caring: Proactive Steps to Avoid Illegal Sexual Harassment and Workplace Violence in the Healthcare Arena”; and, “Is It Legal? Navigating the Dos and Don’ts of the Employment Process.” He can be reached at [Johner.Wilson@lewisbrisbois.com](mailto:Johner.Wilson@lewisbrisbois.com).

### ABOUT THE COMMITTEE

The Employment Law Committee serves members who represent employers and their insurers. Committee members publish newsletters and Journal articles and present educational seminars for the IADC membership-at-large and mini-seminars for the committee’s membership at the Annual and Midyear Meetings. The Committee presents significant opportunities for networking and business referrals. The goal of the Employment Law Committee is to build an active committee with projects that will attract and energize attorneys who practice employment law on a domestic and international basis. Learn more about the Committee at [www.iadclaw.org](http://www.iadclaw.org). To contribute a newsletter article, contact:



**Johner T. Wilson, III**  
**Vice Chair of Publications**  
Lewis Brisbois Bisgaard & Smith LLP  
[Johner.Wilson@lewisbrisbois.com](mailto:Johner.Wilson@lewisbrisbois.com)

*The International Association of Defense Counsel serves a distinguished, invitation-only membership of corporate and insurance defense lawyers. The IADC dedicates itself to enhancing the development of skills, professionalism and camaraderie in the practice of law in order to serve and benefit the civil justice system, the legal profession, society and our members.*

Communication technology has expanded and changed drastically within the last 25 years. The pace of technological advancements has significantly quickened from times past. Before the 1800s, new technology entered society about every 200-300 years (printing press – ca. 1450; telescope – ca. 1600; steam engine – ca. 1750; and telegraph – ca. 1850). And the pace of innovation began to quicken around the 1900s, with such innovations as the steam turbine, telephone, light bulb, moving pictures, gas-powered car, radio and airplane entering society between 1900 and 1950. But new tech releases are currently rolling out faster than ever before! See Mike Woodruff, *Future View: Gaining Perspective on the Rising Waves of Change* 26-27.

Since the mid-1990s, we have seen the explosion of the internet, social media platforms (Twitter and Facebook), hand-held computer devices (smartphones and tablets), and personal use equipment (Fit bits, iPod etc.). These devices are second nature to Millennials, who have surpassed Baby Boomers and are now the largest generation in the workforce and the largest generation in the history of the United States. The combination of these two factors has emphasized the influx of personal use technologies into the workplace.

### **Innovation**

Diversity comes in numerous forms, some broader than others, such as: age, disability

and gender. Despite the plethora of focused critical commentary, Millennials have challenged our approach to numerous cultural and historical icons. Using social media platforms such as Twitter and Facebook, Millennials are redefining how we receive, perceive and produce news. Traditional views of job security and career loyalty have been upended. This mindset has altered the means by which we distribute movies and music, and manufactured goods. And it is this mindset that has ushered society into the current revolutionary age...the Internet of Things.

### **The IoT – Internet of Things**

Now, most people hold a linear perspective when considering innovation, meaning people typically think technology expands in every direction at once. Yet, what actually happens is that a specific technological advance simultaneously disseminates across multiple “platforms.” Although it appeared that everything was changing in the early twentieth century, all that really occurred was that familiar devices were being “electrified” (i.e. clocks, refrigerators, coffee pots, fans, stoves, etc.). See Mike Woodruff, *Future View: Gaining Perspective on the Rising Waves of Change* 28-29. Similarly, computer advances have seemingly infiltrated every known device and process, and are actively shaping the next generation of conceptual inventions.

The Internet of Things (“IoT”) is defined as the interconnection, via the internet, of

computing devices embedded in everyday objects, enabling them to send and receive data. Basically this is the concept of connecting any device with an on and off switch to the internet (and/or to each other), and includes everything from cellphones, coffee makers, washing machines, headphones, lamps, wearable devices and almost anything else you conceptualize. Also, the concept applies to components of machines, like a jet engine of an airplane or the drill of an oil rig. Again, if it has an on and off switch, it can likely be a part of the IoT - a giant network of connected "things" (which also includes people). The relationship will be between people to people, people to things, and things to things. We will look at personal use technologies that impact the workplace.

### **Smart Speakers**

Smart speakers connect to voice-controlled intelligent personal assistant services. A practicing attorney, physician, or insurance professional brings a smart speaker, i.e., an Amazon Echo, into the office. Alexa, the operating software driving the Echo, receives and produces data based on processing information. Generally recognized privileges are potentially compromised when a privileged communication is shared with a third-party. Since Alexa, often running in the background, captures verbal communications, does Alexa's presence in the office encroach upon the attorney-client, physician-patient, and/or insurer-insured privileges? Also, in the medical

environment, Health Insurance Portability and Accountability Act (HIPAA) protections may also be implicated by Alexa's presence in the office.

### **Wearables**

Wearables are accessory devices that monitor and retain data of the wearer's daily (physical) activities, including but not limited to calorie intake and burning, heartrate, steps taken, sleep patterns, etc.). Employee wears a Smart Watch and participates in a group health plan that involves the sharing of acquired data with a third-party vendor. The information shared falls within the purview of HIPAA. So a HIPAA compliant "Business Associates Agreement" governing the relationship between the health plan administrator and the employer is necessary to minimize the employer's potential exposure. Similarly, Smart Watches have unilaterally activated audio recording capacity, and the ability to post to social media outlets. If the employee has access to confidential business records and/or practices, the Smart Watch creates an increased risk of potential theft of trade secret.

### **Smartphones**

Smartphones are the equivalent of mini-computers, fully equipped with GPS tracking capabilities. Also, most wearables have the capacity to track time of physical activity. These realities are quite significant in the workplace. Because Millennials are multi-taskers who value "quality of life," increased

recreational mobility, flexible working schedules and remote working arrangements are gaining popularity. These arrangements can boost employee morale, but they also create fertile ground for claims and potential sources of discoverable information.

For instance, employees who are non-exempt under the Fair Labor Standards Act (FLSA) must be compensated for all hours worked. If the employee is working from home, or is allowed to alter his or her schedule on a daily basis, it can be difficult to track the time actually worked by employees. Moreover, many employers provide cell phones or computers to their employees that the employees are allowed to take home. If an employee, with or without direction, utilizes these items to send work-related emails or perform work-related tasks, that time could be considered compensable.

Similarly, Smart Watches typically have a mechanism to track and monitor time. If an employee claims that s/he is/was a scheduled employee that has worked long hours without proper compensation, the Smart Watch may have provided alternate means of tracking time/work hours, and may have data pertinent to actual hours worked by the employee. So employers should use written policies and training to help ensure they are not violating wage and hour laws.

## Conclusion

Although Millennials have challenged a number of our traditional views, their influence on culture has driven the emergence of many of the conveniences we enjoy on a daily basis – streaming music or movies while in flight, ordering carryout meals for delivery through mediums like Uber Eats, or securing residential lodging in a distant/foreign land. We can responsibly manage the influx of personal use technologies that have entered the workplace by identifying and implementing the policies necessary to minimize potential claims generated by the presence of the personal use items.

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