



Lancaster, Brooks & Welch LLP

BARRISTERS AND SOLICITORS

THORNS IN THE BLACKBERRY BUSH

By Leanne Standryk

You see them everywhere – at Starbucks, in line at the grocery store, behind the wheel of a car – people frantically tapping away at their BlackBerrys and other handheld devices that keep them connected. A device so common that it has generated new vocabulary - users referred to as “crackberrys”.



These handhelds have allowed the development of what could be deemed the “perpetual workplace” in which employees at all levels (both management and non-management) find themselves working harder and longer hours. For Employers, the arrival of the BlackBerry, PDAs and remote access could be hailed as a godsend creating the 24/7 work culture, the perpetual workplace. While the prospect of the 24/7 work culture may be attractive, it presents some thorny issues for Employers. Are these employees entitled to be paid for work done using their Blackberry's, PDAs and/or logging on for work during the evenings and weekends?

In the recent months, legal professionals have coined a new term...”Blackberry overtime”, a term that exemplifies a thorn in the Blackberry bush, where the constant clicking of BlackBerrys and iPhones could be the sound of a claim for unpaid wages, overtime, human rights violations and damages for defamation.

For Employers in Ontario, the *Employment Standards Act 2000* (ESA 2000) creates maximum hours of work and overtime standards. The general provisions regarding hours of work create a maximum threshold of eight (8) hours a day and forty (40) hours a week. Furthermore, an overtime premium is triggered by each hour worked beyond forty-four (44) in each week, or such other threshold as may be provided in the Regulations, for those employees not otherwise exempt from the entitlement. As a minimum employment standard, Employers and employees are precluded from waiving or contracting out of the entitlement. Therefore, if an Employer directly or indirectly allows an employee to work beyond the maximum hours of work, the Employer may find themselves in violation of the ESA. If an Employer directly or indirectly allows an employee to work in excess of forty-four (44) hours a week, the Employer must pay overtime at one and one-half times the normal hourly rate.

The hours of work and overtime provisions of the ESA do not apply to all employees. Employees exempt from the provisions typically include those who work in supervisory or managerial positions and who may perform non-supervisory or non-managerial tasks on an irregular or exceptional basis, certain professionals and salespersons. This said, even if an employee is exempt from the overtime provisions, Employers may still be liable for claims by employees for additional compensation if that employee has stated hours of work in an employment contract or an office policy.

Quite aside from hours of work or compensation issues, Employers need to consider the potential liabilities arising from an employee's ability to send e-mails from the company PDA while away from the workplace. While employees are out of the office, you have no idea and little control over what people are sending. If the e-mail comes from a company e-mail device or Blackberry, the Company could be responsible for the employee's actions. If an employee after a night of socializing were to send out what seemed amusing e-mails which turn out to be offensive or racist, the company could be in hot water and liable for potential violations of human rights legislation, potential defamation claims, etc.

Faced with these thorny legal issues, Employers are advised to consider whether their employees are considered exempt employees under the ESA. They should establish policies that cover the use of BlackBerrys, other electronic devices and the checking of e-mail from outside the office. As with all policies, they should be monitored and enforced. Policies will only have the effect you intend, minimizing liability, if they are applied and enforced consistently.

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