
# The Digital Divide

## Legal Risks with Digital Addictions, Social Media, and Workplace Tech

Danielle Hultenius Moore
Fisher Phillips LLP

Miranda Watkins
Fisher Phillips LLP

Lesley Marlin
Northrop Grumman Corporation

Brittany Wunderlich
Fisher Phillips LLP

Joe Dietrich
Fisher Phillips LLP

Kevonna Ahmad
Fisher Phillips LLP

# Introduction

In the early stages of the internet's emergence into the workplace, employers embraced the limitless possibilities of working remotely, sharing information, and communicating with co-workers all with the click of a button. With the integration of technology at work and being utilized for work purposes, employers now face modern digital hurdles. In essence, modern technological advances have created a "digital divide" between employers and employees. The surge in use and popularity of smartphones, social media, and other emerging technology has also spawned a wave of modern employment law concerns, including digital addictions, technology-based discrimination, BYOD and wage-hour concerns, and social media based adverse actions.

This paper will discuss device-related concerns employers face in the modern workplace, including the rise in digital addictions and whether employers must accommodate such additions, managing device-related performance issues, benefits of using efficiency-based technology balanced against employee privacy, morale, and discrimination concerns, as well as modern BYOD and wage-hour concerns that arise from the use of devices. This paper will further discuss preventative measures employers can take now to minimize liability on claims related to digital devices.

## I. Digital Addictions

### a. What is a "Digital Addiction"?

A digital addiction is broadly defined as the complete disruption of an individual's daily life due to the compulsion to engage in addictive and cyclical behaviors.[1] A digital addiction develops through

[1] Dr. David Greenfield, *Internet Addiction*: *The Addictive Properties of Internet Usage* 135.

similar processes as alcohol and drug addictions. Digital addictions can arise out of feelings of stress, pressure, anxiety, depression, or other underlying mental health conditions.[2]

Studies have found that alcohol and drug addictions have mood-altering physical and psychological effects.[3] Individuals with a device addiction share some, but not all of these symptoms, and contain several new and unique characteristics.[4] For example, nearly 30% of internet users admit to using the internet to escape a negative mood, which is not necessarily a negative trait when done in moderation or in appropriate circumstances.[5] When using the internet, gaming device, smartphone, or social media, for example, the user can experience a flood of dopamine, a chemical that alerts the brain to a pleasurable experience.[6] Individuals become addicted to the surge of dopamine that they experience, resulting in an inability to ignore their devices. In a sense, individuals are using the internet to "self-medicate," much like individuals with an alcohol or drug addiction.[7]

As with substance or alcohol abuse, habitual device users can build up a tolerance to the flood of dopamine, requiring more frequent use of their devices to experience the same effects. A user with a digital addiction may also experience withdrawal symptoms including feeling empty, alone, irritable, depressed, and discomfort when separated from the internet or their device.[8] A study published by the National Institute of Health (NIH) describes the detrimental effects of Internet Addiction Disorder (IAD) (also a form of digital addiction) as causing neurological complications, psychological disturbances, and social problems.[9] The study estimates the prevalence of IAD based on surveys conducted throughout the United States and Europe at an alarming rate of between 1.5 percent and 8.2 percent.[10] Further, the study recommended that IAD should be included within the next iteration of the Diagnostic and Statistical Manual of Mental Disorders (DSM).

Although digital addiction exhibits similarities with other addictions, it has not yet been recognized in the Diagnostic and Statistical Manual of Mental Disorders (DSM-5). However, the DSM-5 appendix

---

[2] Miranda Watkins, *Gonna Have To Face It We're Addicted to… Everything?! Digital Addictions in the Workplace,* Fisher Phillips Newsletter (April 1, 2019), https://www.fisherphillips.com/resources-newsletters-article-gonna-have-to-face-it-were-addicted.
[3] Greenfield*,* at 136.
[4] *Id*.
[5] *Id*.
[6] Greenfield*,* at 136.
[7] Michelle L. Brandt, *Internet Addiction: Too much of a good thing?* Stanford News (Oct. 18, 2006), https://news.stanford.edu/news/2006/october18/med-internet-101806.html.
[8] *Id.* at 136-137.
[9] Hilarie Cash, Cosette D. Rae, Ann H. Steel, and Alexander Winkler, *Internet Addiction: A Brief Summary of Research and Practice*, 8 Current Psychiatry Rev. 4, 292 (2012).
[10] *Id*.

lists internet gaming addiction (arguably a form of a digital addiction) as a "condition that needs further research."[11]

Approximately one out of eight Americans exhibit at least one possible sign of problematic internet use.[12] More specifically, employees with a digital addiction may exhibit behaviors such as inappropriate use of their device during meetings or conversations, becoming defensive when confronted with their internet usage, exhibiting a preference to spend time on their device rather than interacting with others, attempting to hide the device or inappropriate internet use when a supervisor is monitoring them, and exhibiting signs that their work performance is suffering.[13] While excessive or unnecessary internet use during meetings or in front of customers may set off an initial alarm, not all employees will exhibit a heightened level of problematic device usage associated with a digital addiction. An internet addicted employee will likely show symptoms of using the internet or device for three hours of more while at work.[14]

Globally, countries including Australia, China, Japan, India, Italy, Korea, and Taiwan already recognize some version of technology addiction as a disorder.[15] China, South Korea, and Japan have gone as far as sponsoring counseling centers and treatment programs, as well as recognizing a "tech addiction" as a global health crisis.[16] Further, the World Health Organization (WHO) officially voted on May 25, 2019, to include "gaming disorder" as a behavioral addiction in the latest edition of its International Classification of Diseases.[17]

In 2014, San Diego, California doctors identified the first known case of a digital addiction.[18] The patient was diagnosed with internet addiction disorder after wearing his "Google Glass" device for up to 18 hours each day. Google Glass is a wearable technology device with an optical head-mouthed display that gives the user information much like a hands-free smart phone. When asked to remove the Google Glass device, the patient became extremely irritated and frustrated. The patient also exhibited signs of problematic use which manifested in tapping his finger to his temple to mimic the

---

[11] Barbara Booth, *Internet addiction is sweeping America, affecting millions* CNBC (Aug. 28, 2017), https://www.cnbc.com/2017/08/29/us-addresses-internet-addiction-with-funded-research.html.
[12] Michelle L. Brandt, *Internet Addiction: Too much of a good thing?*, Stanford News (Oct. 18, 2006), https://news.stanford.edu/news/2006/october18/med-internet-101806.html.
[13] Dr. David Greenfield, *Twelve Warning Signs of Internet Addiction in Your Spouse, Friend or Loved One* (Current as of Dec 15, 2019), https://virtual-addiction.com/warning-signs-of-internet-addiction/.
[14] David N. Greenfield, Ph.D. and Richard A. Davis, M.A., *Lost in Cyberspace: The Web @* Work, Cyber Psychology & Behavior (2002).
[15] *Id.*
[16] Barbara Booth, *Internet addiction is sweeping America, affecting millions*, CNBC (Aug. 28, 2017), https://www.cnbc.com/2017/08/29/us-addresses-internet-addiction-with-funded-research.html.
[17] Anya Kamenetz, *Is 'Gaming Disorder' an Illness? WHO Says Yes, Adding It To Its List of Diseases*, NPR (May 28, 2019), https://www.npr.org/2019/05/28/727585904/is-gaming-disorder-an-illness-the-who-says-yes-adding-it-to-its-list-of-diseases.
[18] Jack Linshi, *Man Treated For Google Glass Addiction*, TIME (Oct. 14, 2014).

motion used to activate the Google Glass device. Many experts believe that this is only the beginning of a number of digital addiction cases that will inevitably follow in its path.[19]

As the prevalence of digital addictions increases, so does the understanding and treatment of this modern addiction. Rehabilitation facilities in Thailand, Washington State, California, and Florida have developed specialized treatment programs for digital addictions, further legitimizing this phenomenon as a real addiction that employers must take seriously.[20]

### b. Is a Digital Addiction a Disability?

The Americans with Disability Act (ADA) defines a disability as "a physical or mental impairment that substantially limits one or more major life activities."[21] A major life activity incudes, but is not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working.[22] While no case law has affirmatively stated that a digital addiction qualifies as a disability under the ADA, since 2009, several courts have recognized the existence of a digital disability in the context of social security and disability insurance.[23]

Arguably, a digital addiction legally qualifies as a disability if and when it substantially limits more than one major life activity.[24] Courts will need to determine case-by-case whether the individual is substantially limited by their digital addiction, but, practically speaking, finding one major life activity that is substantially limited by a digital addiction is not difficult.[25] For example, if an employee is unable to sleep, work, or drive due to a digital addiction, then their addiction will meet the ADA definition of a disability.

With the likelihood that a digital addiction will qualify as an ADA-covered disability, employers need to treat a digital addiction just as they would any other disability. Once an employer learns of an employee's digital addiction, the employer must engage in an interactive process to determine the availability of reasonable accommodations.

### c. Accommodating Digital Addictions

It is prudent to treat an employee with a digital addiction the same way you would any other disabled employee.[26] Practically, that means taking an employee's apparent digital addiction disability

---

[19] *Id.*

[20] Miranda Watkins, *Gonna Have To Face It We're Addicted to… Everything?! Digital Addictions in the Workplace,* Fisher Phillips Newsletter (April 1, 2019), https://www.fisherphillips.com/resources-newsletters-article-gonna-have-to-face-it-were-addicted.

[21] 42 U.S.C. § 12102(1)(A).

[22] 42 U.S.C. § 12102(2).

[23] *Porter v. Astrue*, WL 1795347 (D.S.C. June 24, 2009); *Bramton v. Astrue*, WL 150309 (N.D. Fla. Jan. 14, 2013).

[24] William D. Goren, *Internet Addiction, the Americans with Disabilities Act, and Employment* (May 1, 2015).

[25] *Id*.

[26] § 8:7. Determining Appropriate Reasonable Accommodation, 1 Disability Discrimination Workplace (October 2019).

seriously and engaging in the interactive process to identify potential reasonable accommodations.[27] Potential reasonable accommodations for an employee's digital addiction might include referral to an Employee Assistance Program, intermittent leave, a modified schedule, or a reduced schedule to accommodate doctor's visits, counseling or therapy, support group meetings, or other forms of rehabilitation.[28] Other potential reasonable accommodations might include utilizing software needed to encourage the employee to stay on task while at work.[29] Further, studies have shown that individuals are less likely to feel compelled to use their devices when they are engaged in a group activity.[30] Thus, implementing a collaborative work environment may help discourage device usage.

It may also be necessary for the employer to consider whether adjusting the employee's schedule to accommodate her digital addiction is reasonable.[31] However, it would be risky to simply terminate that employee without conducting an interactive process as to what, if any, reasonable accommodations may enable that employee to perform their job despite their digital addiction. Similarly, it may be necessary to evaluate a transfer for that employee to a non-device centric position.[32]

Consider another situation involving a remote employee. Assume the employer finds out via a software program that the employee is spending twenty hours per week on non-work-related internet use. Thisinformation, especially if combined with other information from the employee, could put the employer on notice that the employee may have a digital addiction, which would then trigger the employer's obligation to engage in the interactive process. While the employer may proceed to discipline the employee for inappropriate internet use, an employer may not refuse to continue discussing a reasonable accommodation request for fail to provide a reasonable accommodation as punishment for a performance problem.[33]

But what about an employee who tells his or her employer that he or she needs extra rest breaks to use their preferred device as an accommodation for their digital addiction? Must employers accommodation in that fashion? Is such a requested accommodation reasonable?

---

[27] *See* 29 C.F.R. § 1630.2(o)(3); *see also Shapiro v. Township of Lakewood* (3rd Cir. 2002) 292 F.3d 356, 359; *Smith v. Midland Brake, Inc.* (10th Cir. 1999) 180 F.3d 1154, 1174; *Kauffman v. Petersen Health Care VII, LLC* (7th Cir. 2014) 769 F.3d 958, 963; *Taylor v. Phoenixville School Dist.* (3rd Cir. 1999) 184 F.3d 296, 314; *Humphrey v. Memorial Hosps. Ass'n* (9th Cir. 2001) 239 F.3d 1128, 1137; *EEOC v. Sears, Roebuck & Co.* (7th Cir. 2005) 417 F.3d 789, 805-808.

[28] § 8:17 Medical monitoring/treatment, 1 Disability Discrimination Workplace (October 2019).

[29] John Boitnott, Six Effective Ways to Enhance Work Place Productivity, Inc. (Mar. 10, 2015).

[30] Mereerat Manwong, Vitool Lohsoonthron, Thanvaruj Booranasuksakul, and Anun Chaikoolvatana, *Effect of a Group Activity -Based Enhancement Theray Program on Social Media Addictive Behaviors Among Junior High School Students in Thailand,* 11 Psychol Res. Behav. Manag. 329-339 (2018), available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6124457/.

[31] § 8:12. Part-time or Modified Work Schedules, 1 Disability Discrimination Workplace (October 2019).

[32] § 8:13. Reassignment or Transfer, 1 Disability Discrimination Workplace (October 2019).

[33] See EEOC, *The Americans With Disabilities Act: Applying Performance And Conduct Standards To Employees With Disabilities*, available at https://www.eeoc.gov/facts/performance-conduct.html.

However, the same safety concerns that exist with an employee who has an alcohol addiction drinking on the job are not necessarily present with an employee who has a digital addiction wanting to use their device on the job. For example, if a grocery store cashier requested additional work breaks as a reasonable accommodation for a digital addiction, there are no apparent safety concerns to cut against such an accommodation being unreasonable.[34]

Notably, this does not mean employers must ignore the employee's device usage that violates reasonable workplace rules. Consider a situation where an employee blames her tardiness to work as a result of her digital addiction. An employer can still discipline the employee for being late in violation of the workplace rules, particularly if the employee failed to follow proper call-out procedures and if other employees would be disciplined for the same behavior.[35] For example, in *Pacenza v. IBM Corp.*,[36] the plaintiff alleged his employer discriminated against him based on his alleged disability – PTSD. In opposition, IBM argued that the plaintiff was terminated from his employment for accessing sexually-oriented chatrooms online. The plaintiff argues that his PTSD manifested in the form of addiction including a food, alcohol, and sex addiction. The court held that the plaintiff had not established his prima facie case of discrimination because he did not show that his supervisor who decided to terminate his employment was aware of his alleged PTSD disability. Additionally, even if the plaintiff could meet his prima facie case, he did not show that his termination was pretextual. Further, his employer had previously warned him about his problematic internet use, and that the employer has a policy against sex-oriented internet use.

### d. When is Accommodating a Digital Addiction an Undue Burden?

In addition to arguing a requested accommodation is not reasonable, another defense available to employers is that the requested accommodation presents an "undue burden" or "undue hardship" to the employer.[37] "Undue hardship" means an action requiring "significant difficulty or expense" based on actual evidence demonstrating undue hardship.[38] While the legal undue burden standard is high, there are scenarios in which an undue burden defense would be strong. For example, a modified schedule to accommodate a digital addiction would likely be an undue burden when the disabled employee's job is time-sensitive or requires continuity in performance.[39] However, absent such

---

[34] § 8:19. Direct Threat, 1 Disability Discrimination Workplace (October 2019).

[35] *Dewitt v. Southwestern Bell Tel. Co.*, 845 F.3d 1299 (10th Cir. 2017); EEOC, *The Americans With Disabilities Act: Applying Performance and Conduct Standards to Employees with Disabilities*, available at https://www.eeoc.gov/facts/performance-conduct.html#alcohol; Sarah Moore and Lauren Tompkins, *Red Flag: When an Employee Raises ADA Issues During Disciplinary Meetings* (Jun. 3, 2019).

[36] *Pacenza v. IBM* Corp., WL 890060, (S.D.N.Y. Apr. 2, 2009), aff'd, 363 F. App'x 128 (2d Cir. 2010).

[37] § 3:3. Undue Hardship Factors, 1 Disability Discrimination Workplace (October 2019).

[38] 42 U.S.C. § 12111(10)(A).

[39] *See Carr v. Reno* (DC Cir. 1994) 23 F.3d 525, 531; 29 C.F.R. Pt. 1630, App. § 1630.15(d).

circumstances, it is difficult to see how an employer would be financially unduly burdened by accommodating a digital addiction.[40]

### e. Preventative Measure to Avoid Being the Digital Addiction "Test Case"

As modern disabilities emerge and develop, it will be important for employers to keep an open mind about what constitutes a disability given the broad ADA definition of disability. Refusing to consider a digital addiction as a possible disability will likely ensure a lawsuit for disability discrimination, failure to accommodate, and failure to engage in the interactive process. Similarly, being open to modern accommodations for digital addictions will also be a vital part of an employer's preventative strategy.

## II. Managing Employee Performance and Social Media Based Adverse Actions

### a. Investigating and/or Disciplining Employees Based on Social Media Posts

Another modern digital issue employers face involves investigating and/or disciplining employees based upon social media posts.

#### *i. Case Study – Leave Abuse*

We recently obtained a case dismissal on a Motion for Summary Judgment on this very issue. In that case, an employee requested three days of intermittent FMLA leave to treat a hiatal hernia that was exacerbated by stress. On each of the three days, the employee called into the employer's leave hotline and requested FMLA leave. In between when the employee would have worked on day two of his leave and when he would have worked on day three of his leave, the employee went fishing with coworkers. A coworker documented part of the fishing trip by posting a Facebook Live video that identified the group on the fishing boat (but did not actually show the employee fishing). On video, the employee was notably trying to hide from the camera and said, "I'm not out here." A coworker from the boat showed the Facebook video to their supervisor, who escalated the issue, and plaintiff was ultimately terminated for FMLA leave abuse.

The employer in our case did several things that were vital to our success in obtaining summary judgment. First, the employer had legally compliant, written leave policies and separate employee memos prohibiting leave abuse. The employer's leave abuse memos went so far as to provide actual case examples of leave abuse where courts upheld a decision in favor of employers and stated that employees who were found to have abused a leave could be terminated. We were able to point to these already established policies and memos regarding leaves and leave abuse as evidence that the company had no bias towards employees taking leave but explicitly warned employees about abusing leave.

---

[40] § 3:3. Undue Hardship Factors, 1 Disability Discrimination Workplace (October 2019).

Next, the employer saved a copy of the Facebook Live video and made notes regarding the date of the video, the date the video was brought to their attention, and the dates of the fishing trip. Social media evidence can be huge for leave abuse cases, but dates of videos and/or pictures can sometimes be difficult to identify. Similarly, the employer obtained the Facebook Live video in a legally-compliant manner. It did not trick plaintiff or any other employees into accessing their accounts so it could view the video. It also did not force plaintiff to access his account to obtain the video. The Facebook Live video was brought to the employer voluntarily by a coworker who already had access to it.

Further, the employer investigated this report by interviewing other witnesses who were on the boat. In fact, because plaintiff was a union employee, the employer provided plaintiff with a hearing pursuant to the grievance procedures outlined in plaintiff's collective bargaining agreement. Plaintiff was represented at his hearing by a union representative, a hearing officer presided over the hearing, and both the employer and plaintiff were given the opportunity to present evidence, question witnesses, and cross-examine witnesses. While non-union employers need not go quite that far, conducting a prompt, thorough, and unbiased investigation in which the employee is given the opportunity to present their side of the story and present their own evidence will go a long way.

### *ii. Disciplining Employees for Social Media Posts*

Another modern digital workplace issue arises when an employee posts an inappropriate comment or picture on their personal social media account. Can an employer ask an employee to remove the post? What if the employee's page is private? When confronted with this situation, an initial step should be to ascertain when the employee made the post. In general, an employer can discipline an employee for posting on social media during the time that the employee is "on the clock" pursuant to an applicable policy regardless of the content of the post.[41]

An employer may request that the employee voluntarily remove a post that mentions the company in a negative light, reveals confidential information, or purports to reflect the company's position, thoughts, or ideals if unapproved.[42] However, under no circumstances can an employer ask for the username or password of the employee's personal social media account to remove the post themselves.[43]

---

[41] § 6:46. Blogs and Social Media, 1 Investigating Employee Conduct (November 2019); *see also* § 6:41. Internet—Internet policy, 1 Investigating Employee Conduct (November 2019); *see also* D. Albert Brannen, *Managing Tweets, Posts and Links in the Workplace* (February 1, 2012), available at https://www.fisherphillips.com/resources-articles-managing-tweets-posts-and-links-in-the-workplace.

[42] *Id.*

[43] *See* Cal. Lab. Code § 980; Ark. Code Ann. § 11-2-124; Colo. Rev. Stat. Ann. § 8-2-127; Conn. Gen. Stat. Ann. § 31-40x; Del. Code Ann. tit. 19, § 709A; 820 Ill. Comp. Stat. Ann. § 55/10; La. Stat. Ann. §§ 51:1951 to 51:1953, 51:1955; Me. Rev. Stat. tit. 26, §§ 615 to 619; Md. Code Ann., Lab. & Empl. § 3-712; Mich. Comp. Laws Ann. §§ 37.271 to 37.278; Mont. Code Ann. § 39-2-307; Neb. Rev. Stat. Ann. §§ 48-3501 to 48-3511; Nev. Rev. Stat. Ann. § 613.135; N.H. Rev. Stat. Ann. §§ 275:73 to 275:75; N.J. Stat. Ann. §§ 34:6B-5 to

The more difficult situation arises when an employer has asked the employee to remove a post and the employee refuses. Can an employer require the employee to take the post down? Well, it depends.

An employer will not be able to compel the employee to remove the post, particularly if the post contains information concerning the terms and condition of the employee's employment. Section 7 of the NLRA[44] states that an employer will violate the NLRA by implementing policies that would reasonably tend to chill employee speech regarding the terms and conditions of their employment.[45] Employers should pay special attention to social media posts about pay rates, pay disparity, vacation time issues, harassment, unionization, working conditions, illegal activity, and posts supporting workers who have been disciplined, all of which would likely be considered protected speech under the NLRB. Additionally, an employee working for the government could claim their social media post is protected under the First Amendment. In *Bland v. Roberts*[46], the Fourth Circuit Court of Appeals held that merely "liking" political content on Facebook constituted sufficient speech to merit constitutional protection.

However, an employer can discipline and/or terminate an employee for social media posts that include statements that are defamatory, disclose confidential information, or reveal trade secrets.[47] Employers should always document the social media post and any investigation. Employers should discuss with the employee that their post contains defamatory statements or unlawful discloses of trade secrets. Additionally, the employer should describe the possible consequences if the social media post is not removed.

### b. Excessive Internet Use

#### *i. The Problem*

There is no doubt that the internet and technology has revolutionized the way employers conduct modern business. Internet and technology are necessities in our modern world. Today, there are over 24 billion devices connected to the internet – that's four devices for every person on the planet![48]

Managing employee device usage in the workplace is a becoming common employer concern. A study commissioned by Elron Software, which is a filtering software, interviewed 576 employees who

---

34:6B-10; N.M. Stat. Ann. § 50-4-34; Okla. Stat. Ann. tit. 40, § 173.2; Or. Rev. Stat. Ann. § 659A.330; R.I. Gen. Laws §§ 28-56-1 to 28-56-6; Tenn. Code Ann. §§ 50-1-1001 to 50-1-1004; Utah Code Ann. §§ 34-48-101 to 34-48-301; Va. Code Ann. § 40.1-28.7:5; Wash. Rev. Code Ann. §§ 49.44.200 and 49.44.205; W. Va. Code Ann. § 21-5H-1; Wis. Stat. Ann. § 995.55.

[44] 29 U.S.C. §§151-169.

[45] 29 U.S.C. §158.

[46] 730 F.3d 368 (4th Cir. 2013); *see also* § 6:51. Emerging Law, 1 Investigating Employee Conduct (November 2019).

[47] § 6:46. Blogs and Social Media, 1 Investigating Employee Conduct (November 2019).

[48] Karla Lant, *By 2020, There Will be 4 Devices for Every Human on Earth* (Jun. 18, 2017).

have web and e-mail access at work.[49] The study found that only 68 percent of employers have an internet policy.[50] Further, one in three employees reported that they spend 25 minutes or more each workday (1 hour and 25 minutes or more each workweek) using the internet for personal reasons.[51] A different study commissioned by Websense, Inc, an internet access management software company, found that approximately half of the employees surveyed admitted to surfing the internet for an average of 3 hours and 15 minutes per workweek.[52] It is clear that non-work-related internet usage is a problem that employers are facing, and will likely continue to face, in the modern world.

### *ii. The Solution*

First and foremost, employers should consider adding an internet and/or device policy to their employee handbook if they do not already have one, and those who do should make sure those policies are up-to-date.[53] Similarly, reminding and training your employees about such policies should help curb abuse.

Employers may also want to consider setting device usage limitations for employees. For example, employers may consider setting limits on device use during meetings, training sessions, and conferences; when employees are interacting with customers; in production areas and kitchens, or while operating heavy equipment; and while driving.[54] An employer's device use policy could also define: (1) when it is acceptable to use a device during the work day, such as during breaks and lunchtime; (2) the frequency and length of calls permitted during working hours; (3) if headsets are permitted or required; (4) where to store personal devices (e.g. keeping devices out of sight, such as in a desk drawer, is an effective way to keep distractions to a minimum); or (5) appropriate use during business hours (e.g. business calls and brief conversations/texts with family members may be okay, but playing games or downloading music is not).[55] Overall, employers should choose device usage limitations that take into account the nature of their business, each employees job, and the types of issues they have experienced.

Employers may also consider defining device "etiquette." For example, employers may want to include in their device policy requirements that employees using devices at work set their devices to vibrate/silent, speak quietly, keep calls short, take personal calls in private, avoid offensive language,

---

[49] David N. Greenfield, Ph.D. and Richard A. Davis, M.A., *Lost in Cyberspace: The Web @* Work, Cyber Psychology & Behavior (2002).
[50] *Id*.
[51] *Id.*
[52] *Id*.
[53] § 6:41. Internet—Internet policy, 1 Investigating Employee Conduct (November 2019).
[54] § 9:66. Generally—Model policy statement—Electronic and telephonic communications, Guide to Employee Handbooks (October 2018).

[55] *Id.*

use texting as a quick and quiet alternative to talking on the phone, and refrain from using cell phone or other cameras to protect coworker privacy.[56]

If implementing device use limitations into your current policies, employers should then consider practical ways to monitor and enforce such limitations. One way might be to designate an employee to monitor employee internet use. Some studies, however, reflect that employees have negative attitudes to managerial employees physically watching employees perform their work.[57] Instead, employees favor education and reminders about internet abuse and negative effects on the company.[58]

A surprisingly low number of supervising employees are concerned about employee internet use despite the fact the number of non-productive work hours continues to increase.[59] Employers should also consider discussing the severity of the problem with supervising employees. Supervising employees should lead by example, and employers should expect them to model the behavior it wishes to cultivate. Another option might be to monitor inappropriate internet use with tracking software, blocking non-work-related websites, and reward appropriate internet use while disciplining employees for inappropriate use.

## III. Employee Privacy in Digital Devices

Studies estimate that by 2020, over 50% of all U.S. employees work will have the ability to work remotely.[60] By providing devices that allow employees to access work remotely, a multitude of problems arise when seeking to monitor those very devices. Currently, some employers are opting to have Bring Your Own Device "BYOD" policies over the traditional employer provided, company-owned devices. Around 72 percent of all companies have a BYOD policy.[61] There are many benefits to allowing employees to access work from anywhere, but issues may arise when an employee is terminated, and the employer wants to collect its confidential information and/or ensure the employee does not appropriate confidential information.

Privacy implications governing whether an employer can search the employee's device can be drastically different depending on whether the device is employer-owned or employee-owned. Company issued cell phones work similarly to any other company-owned property. Where the device

---

[56] *See also* § 6:34. Cameras and video, 1 Investigating Employee Conduct (November 2019).
[57] Jitendra M. Mishra and Suzanne M. Crampton, *Employee monitoring: Privacy in the workplace?*, SAM Advanced Management Journal.
[58] *Id*.
[59] *Id*.
[60] *By 2020, 50% of Workforce Will Be Remote. Here's How.* SectorWatch, (Apr. 9, 2017), marketwatch.com/video/sectorwatch/by-2020-50-of-workforce-will-be-remote-here-how/EC18E212-D8F5-493E-9602-7E5E5D980ABD.html.
[61] Sam Boyer, *Do You Agree with BYOD? 72 Percent of Businesses Do* (Jul. 28, 2016).

is employer-owned, the employee has a lesser expectation of privacy in the device, thus making it easier for an employer to search.[62]

Where the device is employee-owned, it is important that an employer balance the employee's right to privacy with the legitimate business need of monitoring employee productivity. An employer is always free to ask if an employee will voluntarily consent to a search. If the employee voluntarily consents, the employer should document and have the employee sign that they understand that the search is voluntary.

# IV. Digital Wage-Hour Concerns

## a. Off the Clock Work

### *i. The Practical Problem*

Employees are constantly connected to their jobs. Whether it is through email, text messaging, or workplace apps like Slack, Google Hangout, ChatWork, employees are a click away from work. For example, 70% of employees check work-related emails on weekends, 37% check email after leaving work for the day, and 55% check email while on vacation.[63] Cellphones clearly encourage work outside of normal business hours, and non-exempt employees create a significant risk for employers. This problem extends to all meal breaks and rest breaks as well. Employees may be accessing work materials and performing work-related tasks while they are supposed to be work-free. By authorizing, or simply being aware that employees use their own devices for work after hours, employers face significant risk regarding off-the-clock work.

The de minimis rule is a judicial creation established by the Supreme Court in *Anderson v. Mt. Clemens Pottery Co*.[64] Following Anderson, the DOL adopted the doctrine into its regulations, stating that "insubstantial or insignificant periods of time beyond the scheduled working hours, which cannot as a practical administrative matter be precisely recorded for payroll purposes, may be disregarded.[65] Under the FLSA, courts generally analyze three factors in determining whether time spent in a particular activity is compensable: (1) the practical administrative difficulty of recording the additional time; (2) the size of the claim in the aggregate; and (3) whether the claimants performed the work on a regular basis.[66]

---

[62] Privacy Rights Clearinghouse, *Bring Your Own Device (BYOD)… at Your Own Risk* (Oct. 1, 2014).
[63] Pew Internet & American Life Project Survey (2008).
[64] *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946).
[65] 29 C.F.R. 785.47.
[66] *See Corbin v. Time Warner Entertainment-Advance/Newhouse*, 821 F.3d 1069 (9th Cir. 2016).

Courts vary on how they apply the de minimis rule, and the application is a fact-specific inquiry that is not easily applied across all businesses. For example, some courts have held that up to 10 minutes spent working outside of work hours falls under the de minimis rule, while others have held that seven to eight minutes spent reviewing work prior to a scheduled shift does not fall under the de minimis protection.[67]

Directly addressing email access after work hours, at least one court held that an employee who occasionally sends a handful of work-related emails after regular work hours and spends only a few seconds or minutes reading or responding to an email would not be entitled to compensation under the de minimis rule.[68] However, the court speculated that if in the aggregate, an employee spends more than 10 minutes responding to or reading emails, the de minimis rule may not apply.[69]

States, however, can restrict or reject the application of the de minimis rule. For example, in *Troester v. Starbucks,* the California Supreme Court opined that neither the California Labor Code or California Wage Orders had adopted the de minimis doctrine as an employer defense.[70] This decision may eliminate an important weapon in an employer's arsenal for defending lawsuits in a state like California. Employers must be aware that they need to do everything they can to ensure that they are properly tracking employee's time.

Unfortunately, actual knowledge is not required to hold an employer liable for these violations. A key element of proving a claim is demonstrating that an employer knew or should have known that the employee was working additional time for which he or she was not being compensated.[71] This creates significant liability for employers who likely have constructive knowledge that employees may be accessing emails outside of work hours. These concerns can be further complicated when employers are trying to manage remote workers.

### *iii. Best Practices*

There are a number of measures an employer can take to held reduce the risk of wage and hour violations for work performed off-the-clock.

1. Have a clear policy requiring employees to record all hours worked, wherever it was performed, but also prohibiting off-the-clock work without prior approval and train all employees on these policies. Similarly, consider utilizing written acknowledgements of telecommuting status for remote workers.

---

[67] *See Singh v. City of New York*, 524 F.3d 361, 371-72 (2d. Cir. 2008); *Lindow v. United States*, 738 F.2d 1057 (9th Cir. 1984).
[68] *Allen v. City of Chicago*, 2015 WL 8493996 *at 16 (2015).
[69] *Id*.
[70] *Troester v. Starbucks*, 5 Cal.5th 829, 840 (2018).
[71] *Reich v. Department of Conservation and Natural Resources*, 28 F.3d 1076, 1082 (11th Cir. 1994).

2. Consider a mechanism for making tracking compensable time easier and/or more accessible for employees, potentially through the use of a timekeeping app, for example.
3. Refrain from giving smartphones to non-exempt employees.
4. Maintain accurate records of all compensable time that you know, or have reason to know, that an employee worked.
5. Watch out for trouble spots, such as meal breaks and rest breaks. Train supervisors to refrain from contacting their employees via a device during those breaks.
6. Monitor and conduct sporadic audits to ensure your policies are being implemented appropriately.
7. Consider setting time, use, and etiquette limitations on device usage at work.
8. Do not require or expect non-exempt employees to respond to emails, texts, or calls outside of work/working hours. But if you do, expect to pay them for that time. To that effect, employers should consider requiring employees via a policy to copy supervisors on emails sent after hours/off-the-clock to help capture that time.
9. Consider restricting access to company servers, emails, or other technology outside of work hours for non-exempt employees.
10. Consider creating a standard scheduled workweek totals 38-39 hours (or 7-7.5 hours per day) to allow for a "buffer" so that any additional time worked is not necessarily overtime.

### b. Reimbursements

As the digital world is increasingly incorporated into the workplace, employers have allowed employees to use their personal devices for work. However, it is becoming increasingly more common for non-exempt employees not explicitly required to use personal devices for work to argue they felt forced to do so based upon pressures from their supervisors. This conundrum is creating a bigger reimbursement headache for employers.

As "BYOD" practices becomes more common, we are witnessing states begin to respond with statutes aimed at reimbursing employees for their use of devices for work purposes. Employers in a growing number of states are required to reimburse employees for the use of their electronic devices. Managing policies from state to state becomes more complex as state legislatures formulate their own policies for reimbursing employees. Of course, state laws range in the coverage provided to employees from the more extreme to practices already in place in many industries. Currently, California, Iowa, New York, Massachusetts, Pennsylvania, Montana, the District of Columbia, and most recently Illinois, all have specific reimbursement laws. As employers, you must ensure that your policies and procedures prepare you for the inevitable expansion of these laws.

#### *i. Case Study – California*

California, unsurprisingly, has the most expansive and employee-friendly reimbursement law in the country. California Labor Code section 2802, subdivision (a) states "An employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct

consequence of the discharge of his or her duties[.]"[72] The statute goes on to define necessary expenditures or losses as all "reasonable costs."[73] The problem that employers face is determining what are "reasonable costs".

With cellphones and mobile devices, the calculus is relatively easy and settled. In *Cochran v. Schwan's Home Service, Inc.*, the court held that an employer always must reimburse an employee for the reasonable expense of the mandatory use of a personal cellphone, even if the employee did not purchase a different cellphone plan because of the usage at work.[74] The court held that the employer must pay "some reasonable percentage" of the employee's cell phone bill.[75] This leaves employers with the difficult task of deciding what is "some reasonable percentage" of an employee's cellphone bill. What remains unclear is whether an employee is entitled to a reasonable percentage of his or her internet bill. Depending on the type of work conducted over the employee's personal wireless server, arguably an employee is entitled to a reasonable percentage of the wireless bill.

To avoid liability, employers should establish clear policies and procedures on the usage of mobile devices. Employers must have a BYOD policy and have it acknowledged by the employee and they must provide a stipend to cover the reasonable expenses of each employee. In order to address the "some reasonable percentage" issue, employers should implement a procedure for notifying HR if the stipend is insufficient to fully cover expenses incurred by an employee. Finally, it is important that employers notify employees that you may track the content and use for the devices covered by the BYOD policy and that you actually monitor these devices.

In *Gattuso v. Harte-Hank Shoppers*, *Inc.*, the California Supreme Court outlined three expense reimbursement procedures that could satisfy the statute:

1. The Actual Expense Method: where the employee calculates his or her actual expenses incurred and submits the expense to the employer for reimbursement.[76]
2. The Lump Sum Method: employers can reimburse employees through a fixed lump sum payment for expenses based upon historical expense data.[77]
3. The Enhanced Compensation Method: under this calculation, an employer may increase an employee's wages to cover the amount for expected business-related expenses incurred by the employee.[78]

---

[72] Cal. Labor Code section 2802(a). (2016)
[73] Cal. Labor Code section 2802(c). (2016)
[74] *Cochran v. Schwan's Home Service, Inc.*, 228 Cal.App.4th 1137, 1144-45 (2014).
[75] *Id*. at 1144.
[76] *Gattuso v. Harte-Hank Shoppers, Inc.*, 42 Cal.4th 554, 568-69 (2007).
[77] *Id.* at 570.
[78] *Id*. at 575.

The three methods have their drawbacks, from the heavy burden on both the employer and the employee due to the increased administrative responsibilities in maintaining accurate receipts and records, to making up the difference when a lump sum or stipend do not cover the actual cost incurred by the employee. In choosing which method is best for your business, look inward to your procedures and record keeping capabilities, and select the method that your business feels most comfortable with.

### *ii. Case Study – Illinois*

Effective January 1, 2019, Illinois became the latest state to enact their version of a business expense reimbursement law. The Illinois statute differs from the one in California as it places the burden on notifying the employer of the need for reimbursement on the employee. The statute requires employers to reimburse employees for all necessary expenditures incurred during the scope of employment.[79] "Necessary expenditures" is defines as all reasonable expenditures or losses required of the employee in the discharge of employment duties and that inure to the primary benefit of the employer.[80] An employee must submit any necessary expenditures with supporting documentation within 30 days after incurring the expense.[81]

With the Illinois statute untested, employers must ensure that they are complying with the new law to the best of their abilities. Looking to similar laws such as California's, Illinois employers can follow one of the expense methods outlined in *Gattuso*. Again, being proactive to adjust to new legislation by implementing clear and enforceable procedures can save an employer the headache of dealing with lawsuits in the future.

### *iv. The Solution*

Employers can take many preventative measures to reduce risk concerning reimbursements for digital device usage:

1. Have a BYOD policy that is acknowledged.
2. Provide a set stipend for reimbursement.
3. Require employees to notify human resources if the stipend is insufficient to fully cover expenses.
4. Notify employees that you may track content and use for dual-use devices.
5. Actually monitor dual-use devices.

---

[79] 820 ILCS 115/9.5 (2019).
[80] *Id.*
[81] *Id.*

## Conclusion

With technology evolving sometimes faster than we can keep up, it will be increasingly important for employers to be flexible, open minded, and willing to revisit their policies often. Failing to do so may result in significant legal consequences. Digital-based claims, such as digital addictions, and older employment practices being replaced by modern, digital practices will likely be the future source of employment lawsuits. Your workplace can defend itself by implementing some of the proactive measures regarding policies, procedures, training, and investigations discussed in this paper. By doing so, your organization will be well on its way to creating a compliant digital culture.