



A New Wave in Workplace Law
Inside Counsel Conference 2020 **February 26–28, 2020**



The Digital Divide: Legal Risks with Digital Addictions, Social Media, and Workplace Tech

Lesley Marlin – Senior Corporate Counsel, Northrop Grumman Corporation

Danielle Moore – Fisher Phillips San Diego

Miranda Watkins – Fisher Phillips San Diego - Moderator

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Meet Your Panelists



Danielle Moore

*Partner
Fisher Phillips*



Lesley Marlin

*Senior Corporate Counsel
Northrop Grumman*



Miranda Watkins

*Associate
Fisher Phillips*



Let's Talk About Technology & Boundaries!

- Digital Footprint
- Wage & Hour Issues
- Managing Employee Performance
- Digital Addictions and Accommodations



Digital Footprint

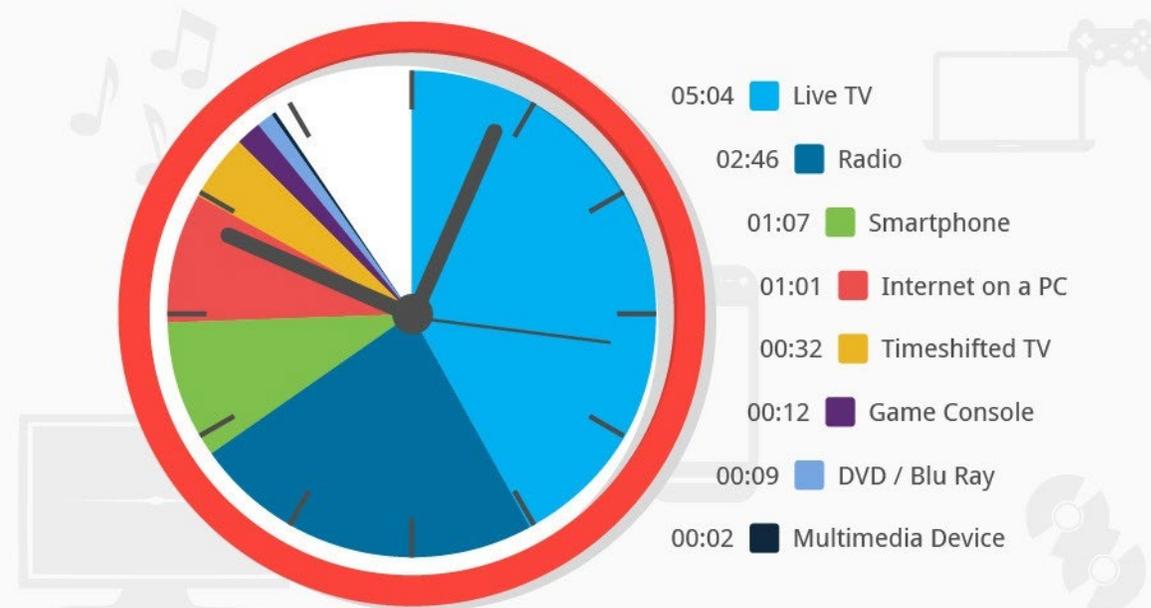


Did You Know?



Americans Spend 11 Hours A Day With Electronic Media

Average time American adults (18+) spend with electronic media in Q4 2013 (hours:minutes)



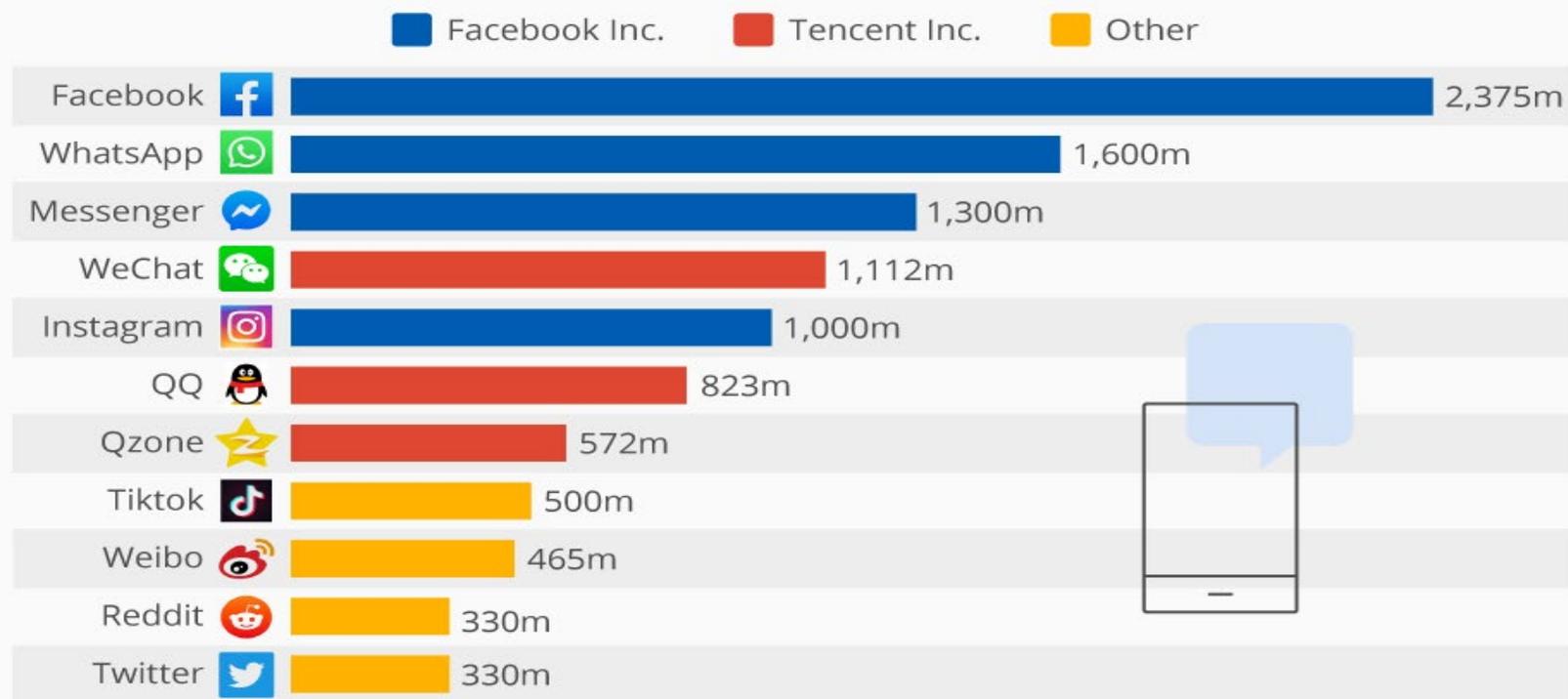
Source: Nielsen

Mashable **statista**

Did You Know?

Facebook Inc. Dominates the Social Media Landscape

Monthly active users of selected social networks and messaging services worldwide*



CC BY ND
@StatistaCharts

* July 2019 or latest available

Source: Company data via DataReportal Q3 Global Digital Statshot

statista



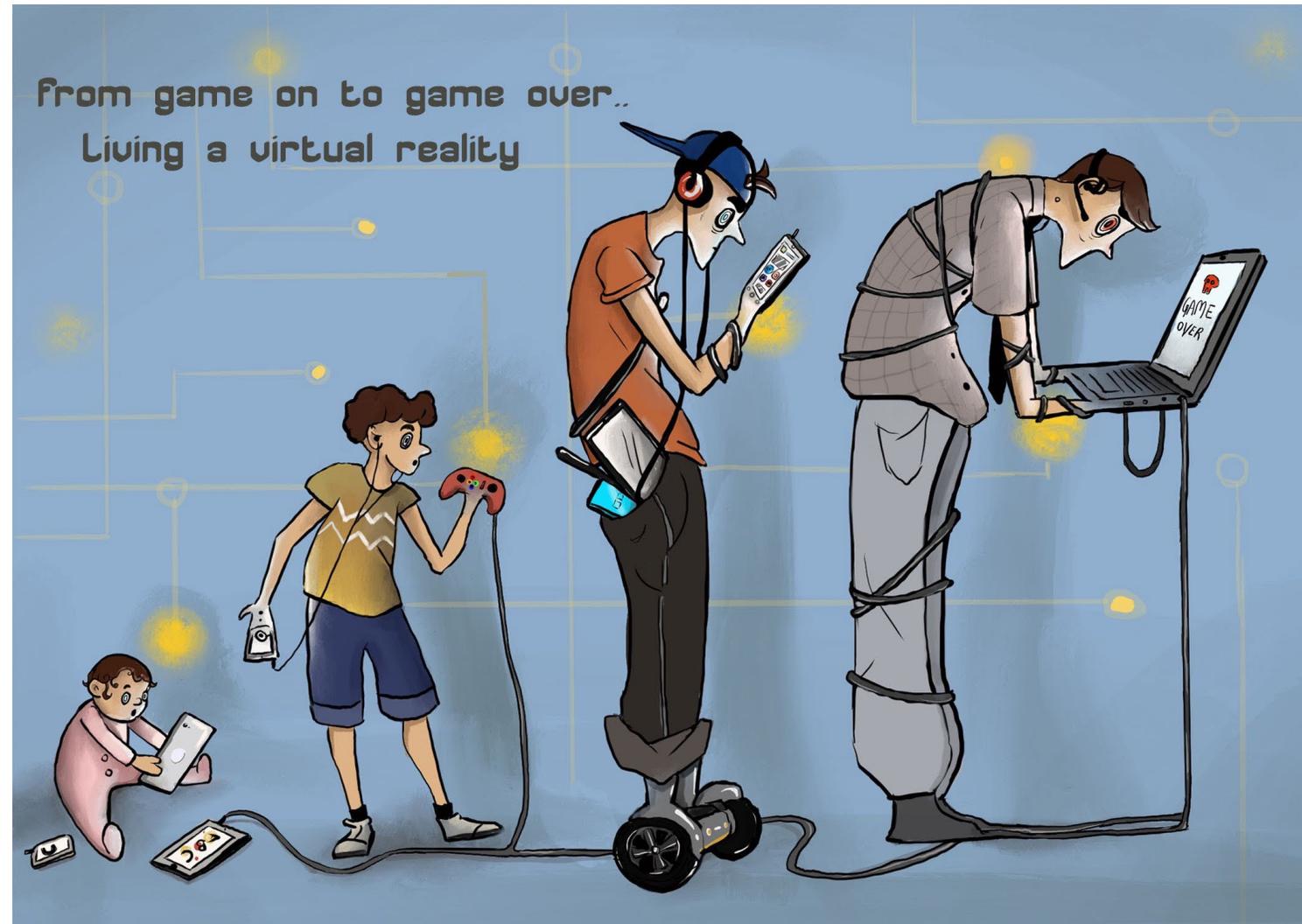
Digital Addictions



Polling Question: Q1. Digital Addiction

Have you dealt with an employee who had a digital addiction?

- A. Yes
- B. No
- C. I don't know



Digital Addiction: Is It Real?



- Develops through similar processes as alcohol and drug addictions
- Digital addicts share some of the mood-altering physical and psychological effects that alcohol and drug addicts experience
- When using a device, digital addicts experience a flood of dopamine alerting the user's brain to a pleasurable experience, similar to other types of addicts



Digital Addictions and Accommodations

- Is “digital addiction” a disability?
- Is accommodating a digital addiction different?
 - How can you accommodate when screens are necessary to perform the essential functions?
 - Can you treat the digitally addicted employee just like any other disabled employee?
 - Is the interactive process any different?
- What do digital accommodations look like?
 - Employee Assistance Program (EAP) referral
 - Leave – continuous or intermittent
 - Utilize specific software to encourage the employee to stay on task at work
 - Transfer to a non-device centric position
 - Extra meal/rest breaks to allow the employee access to their device?



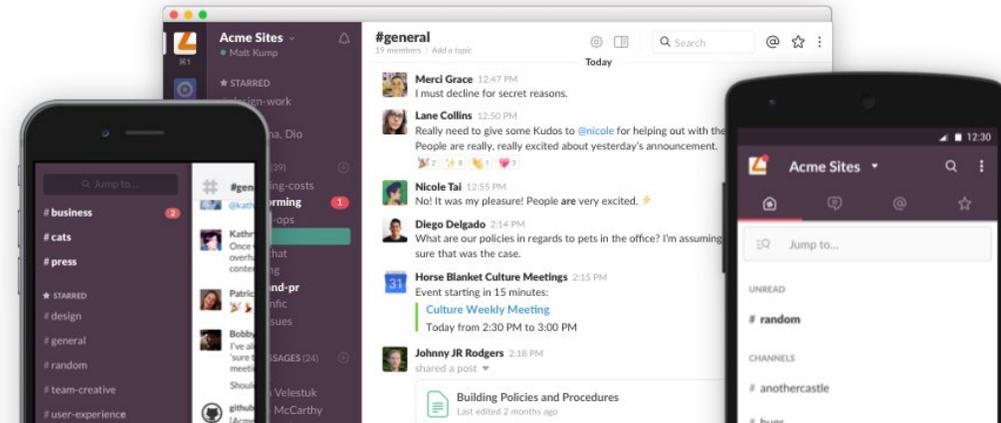
Wage & Hour Issues



Smartphone Users

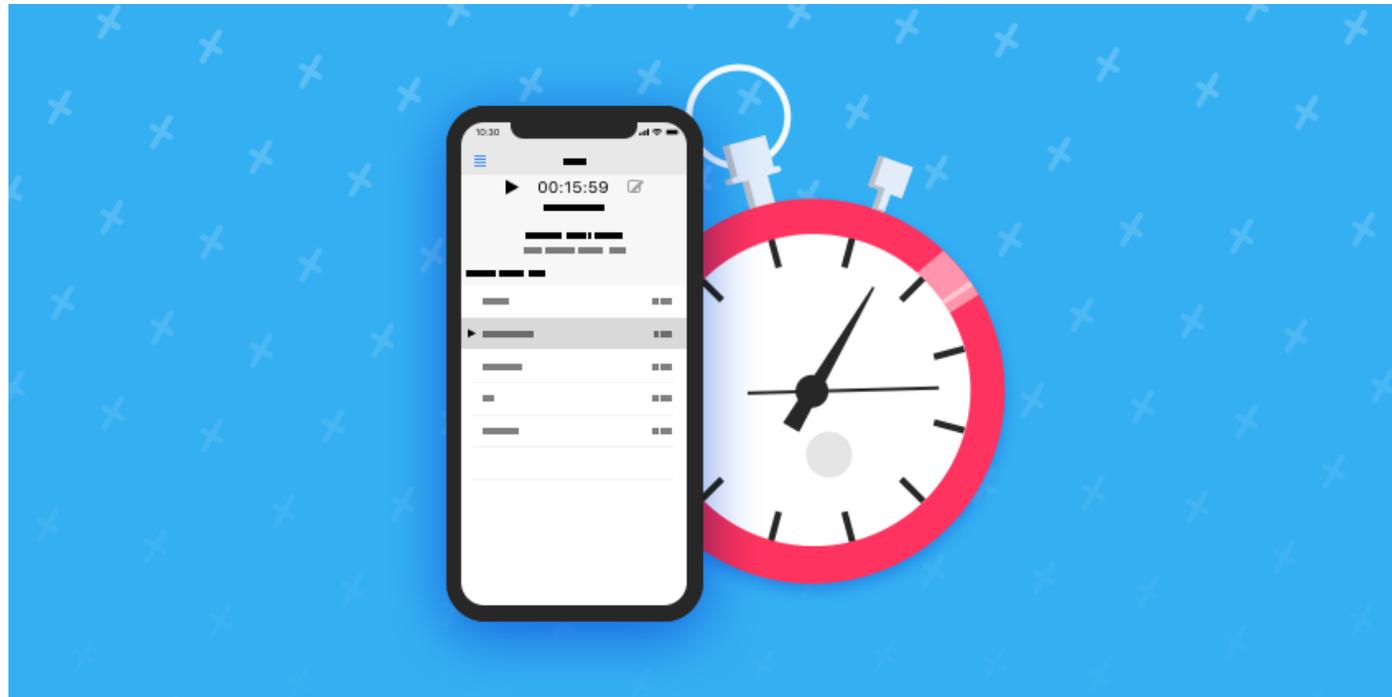
- 70% check work-related email on weekends
- 46% say they often check email while off work on a sick day
- 55% often check email before they go to work
- 37% often check email after leaving work for the day
- 55% check email while on vacation
- 43% report some level of on-the-go work emailing when commuting or shopping

But wait....it's not just smartphones and e-mails!

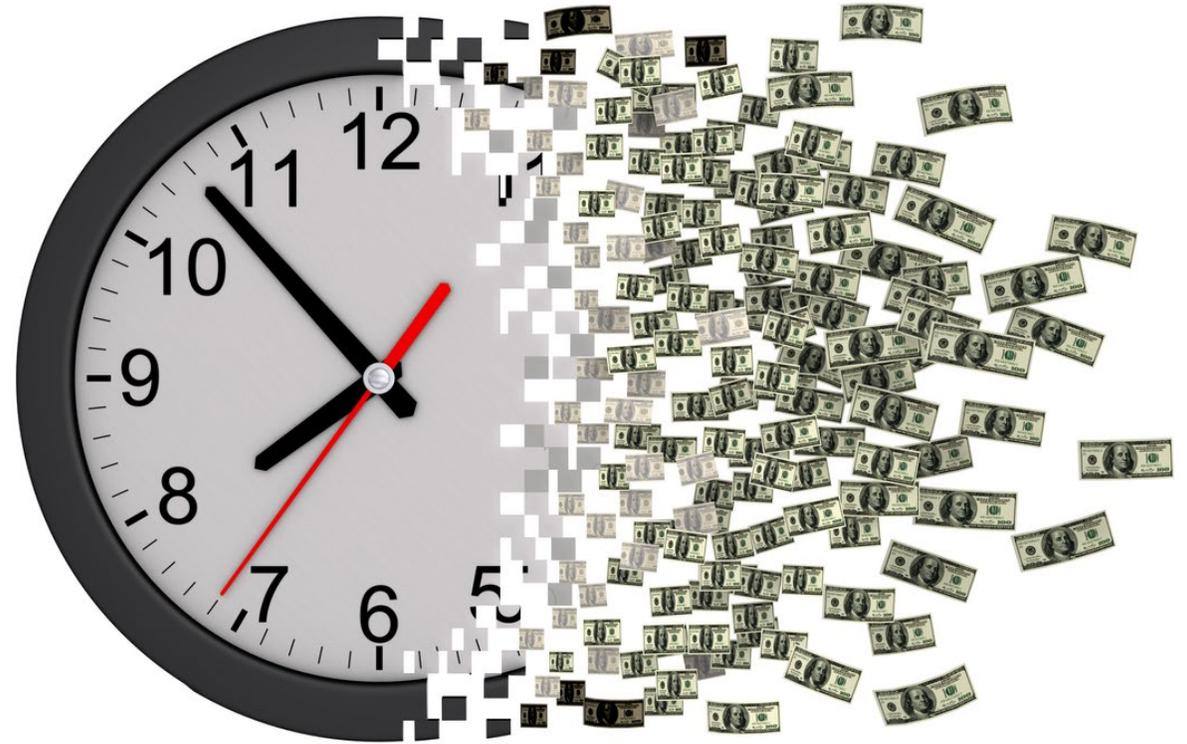


Challenge – Tracking Non-Exempt Work Outside Normal Business Hours

- Sporadic work time outside of the office is difficult to track accurately, if at all
- Non-exempt employees cannot “volunteer” to work for free
- *De minimus* exception?



Work Outside Normal Business Hours & Continuous Work Day Rule



Managing Off The Clock Risk In The Digital World

- Exempt versus non-exempt?
Different approaches?
- Policy & training
- Data & accurate records
- Monitor & audit
- Watch out for trouble spots
such as meal and rest breaks,
on-call time, meeting time,
training time, early/late work,
work at home, travel



Polling Question – Q2. BYOD Policy

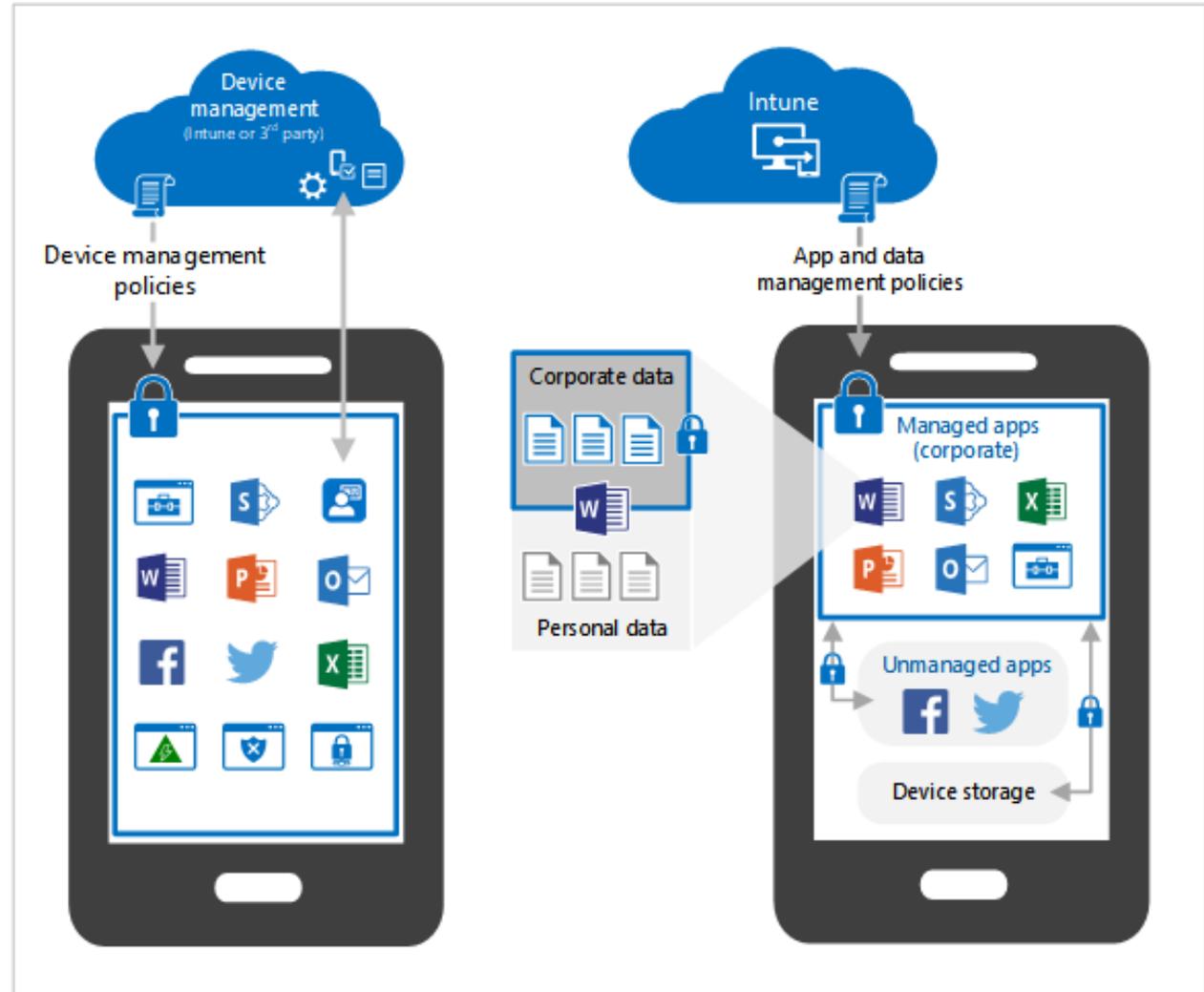
Is your company currently using a BYOD policy?

- A. Yes
- B. No
- C. I don't know



BYOD Considerations

- Technology
- Access
- Reimbursement



BYOD: Reimbursement

- State laws on work use of personal devices evolving and increasing
- Currently, California, Iowa, New York, Massachusetts, Pennsylvania, Montana, the District of Columbia, and Illinois have specific (and sometimes differing) reimbursement laws
 - CA – employers must reimburse for “mandatory use” if you know or should have known an employee was using their personal device for work
 - IL – places burden on the employee to notify the employer of the need for reimbursement



BYOD: Best Practices

- Have a policy & and get it acknowledged
 - Notify employees you may track content and use
 - Provide a stipend & require employees notify Human Resources if the stipend is insufficient to fully cover expenses
- Actually monitor work usage on employees' personal devices





Managing Performance and Social Media Concerns

Managing Performance: Excessive Use

- Survey – average office employee spends **56 minutes per day** using their cell phone at work for non-work activity → so just under **five hours per week** of goofing off on phones
- Personal email and social media made up the majority of the wasted time, with sports sites, mobile gaming, and shopping placing a far distant third, fourth, and fifth place
- So why is this a problem for employers?
 - Financial losses from lower production
 - Missed deadlines
 - Safety issues from not paying attention
 - Forced overtime
 - Noise and other disruption can frustrate other employees and lower morale

Managing Excessive Usage

- Usage limitations
- Cell phone etiquette
- Cell phone policy
- Monitoring
- Work site reminders
- Disciplinary action



Managing Performance and Social Media Concerns



YOU'RE FIRED



**i dare you to fire me
for what i said
about you
on [facebook](#)**

Case Study – Fishy on Facebook

National Company faced rampant leave abuse problems. It issued multiple warnings to employees about leave abuse, its consequences, and provided employees with examples of leave abuse.

Fast forward...Mechanic-Employee requests intermittent leave due to a hernia exacerbated by stress. Company grants his requests. Employee then requested to use PTO to go fishing with coworkers. Company denied his request because too many other people had requested vacation the same day. Weeks later, Employee requested three days of his intermittent leave for a hernia. In the middle of days two and three, Employee goes fishing with coworkers. A coworker posts a video of the group on the fishing boat to Facebook Live. On video, Employee tries to hide from the camera and is heard saying “I’m not out here.” Soon after, a coworker shows the video to Employee’s supervisor. Company investigates and terminates Employee for leave abuse.

Managing Leave Abuse Involving Social Media

- What did the Company do right?
 - Warned employees about leave abuse
 - Preserved the Facebook Live video which indicated Employee knew he was doing something wrong when he tried to hide and said “I’m not out here.”
 - Conducted a full investigation, which included questioning the coworkers from the boat as well as Employee
 - Terminated only after corroborating Employee was engaging in a physical activity (fishing) while on leave from a physically-strenuous job (mechanic) for his own serious health condition (hernia)
- Other examples?



Plug In?

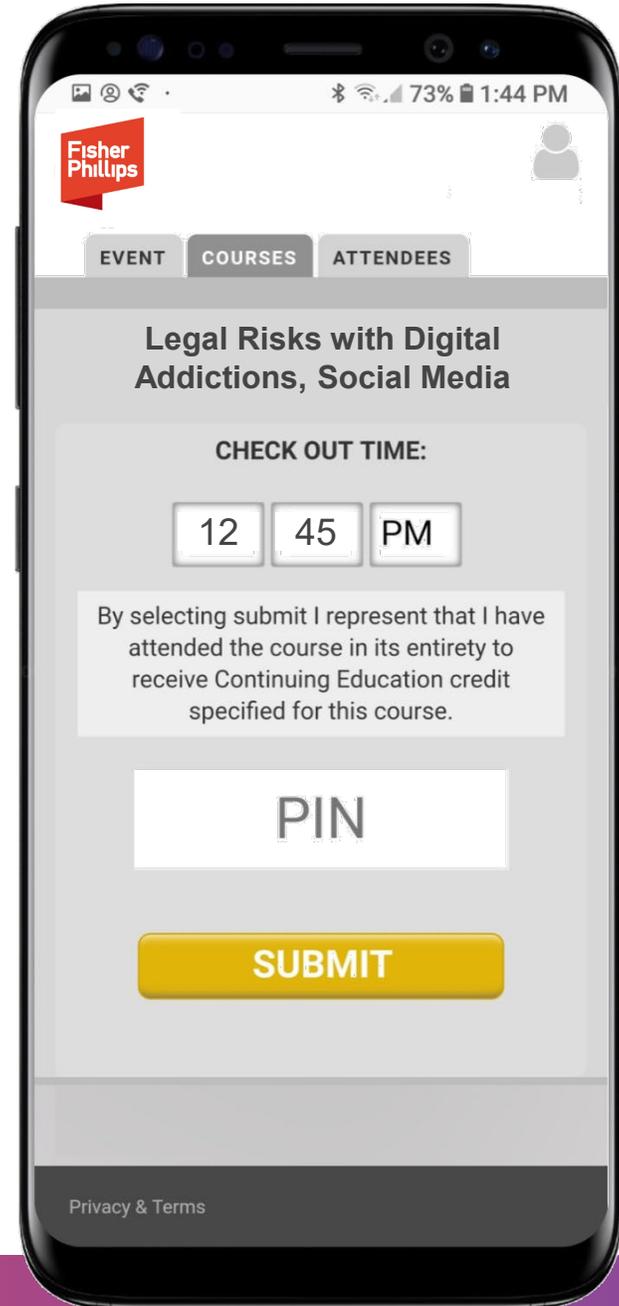


Unplug?

Questions?



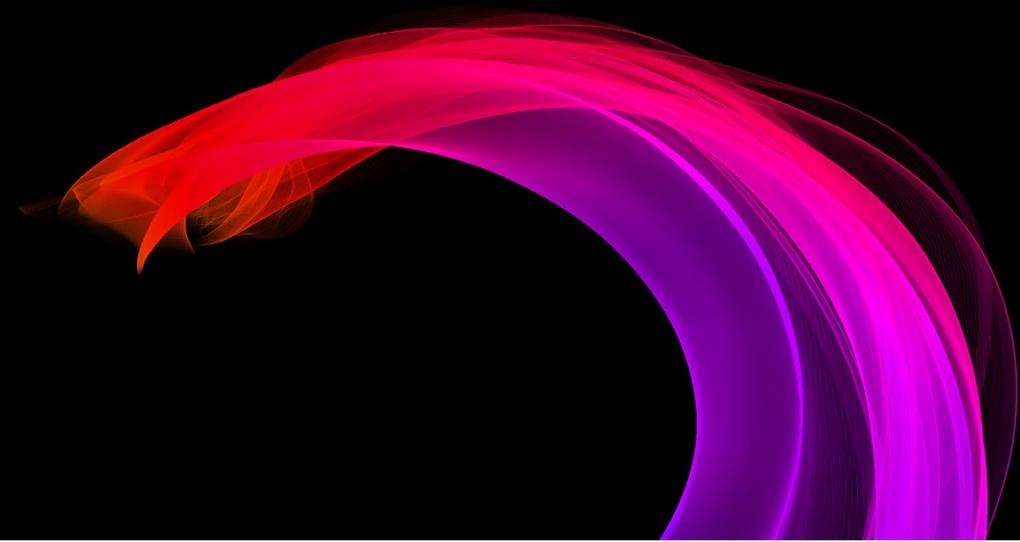
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Thank you

Danielle Moore
dmoore@fisherphillips.com
858-597-9616

Lesley Marlin
Lesley.marlin@ngc.com

Miranda Watkins
mwatkins@fisherphillips.com
858-597-9624