



## Employment Law Update

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**Please contact any  
member of our  
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questions about  
these and other  
employment  
issues.**

### **EMPLOYEE AFTER HOUR BLACKBERRY USE MAY REQUIRE OVERTIME PAY**

Employees today typically have continuous accessibility to work through personal data assistance (PDAs) like the iPhone and the Blackberry. Employees can work at any time of day, and working overtime hours no longer requires a physical commute to the office. As employees rely more and more on PDAs to conduct work after hours or remain connected to the workplace, employers become increasingly susceptible to overtime payment claims from nonexempt employees under the Fair Labor Standards Act (FLSA).

A court case filed in 2010 by Chicago Police Sergeant Jeffrey Allen illustrates the risk to employers of overtime liability through the use of PDAs by their employees. Sergeant Allen claimed that he was owed compensation for the overtime hours related to after hours spent on Blackberry emails. Chicago Mayor Daley called Sergeant Allen's suit "silliness in the time of economic crisis." However, an Illinois judge refused to dismiss Sergeant Allen's action. Presumably, the case will now go to trial.

Employers may find themselves at risk of liability for overtime wages to employees where the employer knows or should have known that the employee was performing uncompensated work. This can include work done on a Blackberry. Of course, not all uncompensated work will create overtime liability; an employee who accesses his PDA to check his email, for example, may not necessarily be eligible for overtime for the brief minutes spent glancing at the messages. Any work that takes less than ten minutes is likely to be found to be de minimis. When, however, the work done via Blackberry email begins to exceed ten minutes and becomes more substantial, the employer may be liable for overtime wages if this employee works over forty hours in a week. If your business justifies the use of the Blackberry by nonexempt employees outside of work, you should assure that the hours spent after hours are accurately recorded and monitored.

## **NEW EMPLOYER POSTING REQUIREMENT**

On August 25, 2011, the National Labor Relations Board (“NLRB”) issued a heavily criticized final rule that will require all employers covered by the National Labor Relations Act (“NLRA”) to post a notice in the workplace informing employees of their rights to form, join and assist a union, to bargain collectively with their employer, to act together to improve wages and working conditions, and/or to refrain from any of these activities. Employers must post the new notice by January 31, 2012 (the NLRB postponed the original implementation date of November 14, 2011).

All union and non-union employers subject to the NLRA, except the United States Postal Service, must post the new notice. The NLRA applies to almost all private-sector workplaces, including, but not limited to, manufacturing plants, retail centers, private universities, and health care facilities. The NLRA does not cover federal, state or local government workers, agricultural and domestic workers, any person subject to the Railway Labor Act, independent contractors, supervisors, and/or workers employed by a parent or spouse.

The poster is available for download at the NLRB website (<http://nlrb.gov/poster>). Copies of the poster are also available from NLRB regional offices. The poster must be at least 11 x 17 inches. The notice must be posted in a conspicuous place, i.e., the same locations where the employer posts other employee notices. In addition, employers who customarily post notices to employees regarding personnel rules or policies on an internet or intranet site must post the NLRB's notice on those sites or post a link to the NLRB's web site, which must read, “Employee Rights under the National Labor Relations Act.”

Various remedies may be invoked as a result of a failure to post, including, but not limited to, an unfair labor practice or tolling of the statute of limitations for filing NLRA charges. The failure to post may also be used as evidence of the employer's anti-union motive in a proceeding.

Although there have been legal challenges to this rule, for now, employers should assume they will be required to comply with the posting requirement and post the notice on or before January 31, 2012.

## **AGE DISCRIMINATION CLAIM REINSTATED WHERE REASONABLE JURY COULD FIND THAT EMPLOYER'S REASONS FOR TERMINATION WERE PRETEXTUAL**

Terrence O'Reilly brought an action against his former employer, Marina Dodge, alleging that he was terminated from his sales associate position in violation of the Age Discrimination in Employment Act (“ADEA”) and corresponding state statute in *O'Reilly v. Marina Dodge, Inc.* The employer claimed that O'Reilly was terminated as a result of his continued disorganization, lackadaisical approach to his job performance, failure and refusal to embrace new initiatives to increase profitability, and negative attitude about the workplace. However, the employer did not have any contemporaneous notes or records to support these assertions, such as performance reviews, and instead relied entirely on affidavits prepared after the fact. In addition, the 59 year-old O'Reilly demonstrated that he had been subjected to degrading comments by predominantly younger co-workers, such as asking him if he forgot customers' names, asking if could find his way home or needed a GPS, and calling him a “cone head” in reference to his bald head.

The Second Circuit determined that the case should go to a jury to determine whether the employer's explanations for firing him were pretextual, and his age was the real reason he was fired. Our federal court is sending a clear message - employers need to maintain job performance records, or even what appears to be a frivolous claim will get to a jury. Remember juries are made up of employees – not employers.

## Locations

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