



## THE BLACKBERRY DILEMMA: PAYING FOR THE 24/7 WORK CULTURE

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By Gwendoline Allison

The arrival of BlackBerrys, PDAs and other forms of remote access has been hailed as a godsend for those looking for additional flexibility and options to keep in touch with our work. They provide more freedom to stay connected with work when away from the workplace and mean we are free to accept and handle work projects anytime and anywhere.



While that prospect is attractive to many employers and employees, it raises difficult issues. One is the psychological issue: BlackBerrys create a feeling of the "24/7" working environment, which in turn may contribute to stress and "burn-out". Discussion of this issue is common in the career section of newspapers. In February of this year, Citizenship and Immigration Canada banned its employees from using BlackBerrys between 7 p.m. and 7 a.m., for the stated reason of cutting down work stress.

A further issue, one not discussed as often, is compensation: is an employee entitled to be paid for using a BlackBerry or logging in for work purposes at night or on weekends? If so, what options are available to employers to minimise or manage that liability?

The compensation issue is becoming a hot media topic. Indeed, it was a point of negotiation between the U.S. television network, ABC, and the Writers Guild of America. During the negotiations, the network had sought a waiver of all pay claims for work using BlackBerrys. The guild disagreed. Its spokesperson stated the case as follows:

Our members are professionals, and they are comfortable with the tools of the trade. What we want to avoid is the 24/7 workplace. People are entitled to time off the job. BlackBerrys can be liberating; they can help people keep tabs without going into the office. But they can also shackle people to their jobs. If people use their BlackBerrys to do their jobs - to write material, schedule appearances, and so forth - while not physically at their desks, they should be compensated.

The parties reached a compromise, wherein ABC agreed to pay workers for using their BlackBerrys at home, but only for work related usage. The compensation will not include use of the device to check email at night, but writers and producers will

be compensated in certain circumstances, such as when an important news story breaks after office hours.

For employers in British Columbia, the issue falls within two related areas of the law: overtime and payment for hours worked. Under the *Employment Standards Act*, the maximum hours of work are eight hours a day and forty hours a week. If an employer directly or indirectly allows an employee to work beyond those hours, the employer must pay overtime pay at one and one-half times the normal hourly rate. For salaried employees, the salary is converted to an hourly rate by dividing the salary by the "normal or average" hours worked by the employee.

The overtime provisions do not apply to all employees. For example, they do not apply to managers or "high technology professionals".

However, even if the employee is excluded from the *Employment Standards Act* overtime provisions, the employer 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. In that situation, the rate for the additional pay would be calculated by dividing the salary by the regular hours and then paying the same rate for the additional hours.

An employee does not need specific permission to work outside regular hours before being entitled to additional pay. An employer may become liable if it provides the mechanism for BlackBerry use or remote access but says nothing more. Very often an employer is not aware of the potential liability until faced with a claim after the fact. The claim itself may span several months and the employer may have little in the way of a defence.

A laissez faire approach to the issue is a risky and potentially expensive proposition for an employer. There are, however, several options available to an employer to address the potential liability for claims of additional pay for BlackBerry use or remote access:

1. have a clear policy regarding BlackBerry use and remote access after hours; and
2. ensure there is a consistent approach to hours of work and overtime.

### **BlackBerry/Remote Access Policy**

The following are questions an employer should consider when creating a BlackBerry policy.

- Do you want the employee to use a BlackBerry at night or on weekends, or do you prefer to have the employees leave their BlackBerrys in the office when they leave? Some employers such as Citizenship and Immigration Canada ban the use of BlackBerrys after a certain period, and block out remote access at certain hours.
- Under what circumstances do you want the employee to be required to be

available on BlackBerry or remotely: is it generally, or is it emergency only? If it is for emergency use, what constitutes an emergency?

- Do you want the employee to require specific permission before being entitled to log on after hours?
- If you want the employee to be available, how should the employee be compensated? If the employee is an hourly employee, there may not be a choice but to pay, or give time off in lieu. For salaried employees, there are several options, which tie in with a general approach to hours of work.

### **Hours of Work**

As set out above, for salaried employees, the potential liability arises when employees have set hours of work, either by virtue of a contract or a workplace policy. In that way, the employer is defining the "normal or average" hours of work.

To reduce or manage the potential liability, the employer should consider the following questions:

- Do you really need a statement of set or regular hours? If not, don't have one.
- If you really need or want a statement of regular hours, consider a policy that to be eligible for additional pay, the employee must obtain authorisation in advance.
- Consider a policy statement that the salary includes all hours worked. Such a statement will not entirely eliminate an overtime claim by a non-manager but will eliminate claims by management and other employees excluded from the overtime provisions of the *Employment Standards Act*.
- As an alternative, consider other forms of compensation for additional hours, such as time off in lieu or a bonus at year end. Provided that the total income divided by hours worked does not fall below the minimum wage, the scheme likely will not offend the provisions of the *Employment Standards Act*.

### **Enforcement**

As with all policies implemented by employers, policies will only be effective if they are applied and enforced rigorously. Consequently, ongoing monitoring is crucial. Having clear policies and enforcing them will go a long way to managing the employer's potential liability for additional pay. Clear policies and expectations may also deal with an employee's perception that they are expected to be available for the employer 24/7.

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