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Businesses not required to provide cell phones for employees

By: Rochester Business Journal Staff Kathleen Driscoll ○ July 8, 2019



"In a cost-cutting move, senior management says we will no longer be able to provide cell phones to our employees. From now on, my team will be expected to provide their own phone for work purposes. Is this legal? And is it fair to employees who are using their own phones all the time for work? And what about privacy, like the app that companies can use to "wipe phones clean" when someone leaves? Please advise."

Whether people like it or not, the requirement is firmly in place: Employers expect employees to be available remotely.

Indeed, a survey of 500 senior executives last year by Oxford Economics, commissioned by Samsung Electronics America, confirmed what we all know, that "modern work is mobile work." Nearly 80 percent of survey respondents said employees cannot do their jobs effectively without a mobile phone.

While the expectation is not new, there are lots of questions around who pays for these phones and the use of Bring Your Own Device (BYOD) policies in the workplace.

Only about 50 percent of organizations use "Employer Provided Device" (EPD) programs for their employees, according to the Oxford survey. The remainder rely on BYOD policies and providing reimbursements or stipends to employees for using their own phones. Roughly half of the companies with BYOD policies provide a stipend or partial payment to employees and that percentage grew from 40 percent to 53 percent over the last two years, according to the survey. Stipends range from \$30 to \$50 per month.

While this new requirement to pay for your own phone at work might feel wrong in some way, it is not illegal for an employer to require that personal cell phones be used for work.

"It's analogous to an employee that has to drive his/her own vehicle to client sites to perform aspects of their job," says Steve Modica, attorney and owner of Modica Law Firm in Rochester. "It may be reasonable for the employee to expect that the employer pay some of the costs to maintain the phone; however, there is no law that compels the employer to do so."

But there are requirements that employers are required to follow under state and federal laws. If the cell phone is considered "a tool of the trade," and the costs of paying for it personally would bring an employee's wages under the minimum wage, then that would be a violation of the Fair Labor Standards Act (FLSA), says Sharon Stiller, partner with Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara and Einiger LLP in Rochester. New York state has a similar law on the books.

If there is no state requirement, employers do not have to provide employees with reimbursement for the use of personal cell phones, Stiller says. However, the legal landscape around reimbursement is changing, resulting from a law passed in California requiring employers to reimburse employees for "expenses incurred as a result of their employment."

In 2014, the California Court of Appeals ruled that employers are required to reimburse employees a "reasonable percentage" of their cell phone use, even if they have plans that provide for unlimited cell phone use. This year, Illinois joined California in requiring employers to reimburse employees who use personal cell phones for work.

"This is becoming a 'hot button' issue in many states and has lately become the subject of many class actions," Stiller says.

Employers with BYOD policies choose them because of their ability to save upfront costs in acquisition, according to the Oxford Economics study. But over time there are other costs to consider. "The administration of mobile devices

often costs much more in the long run than the purchase price for phones—and even BYOD companies almost always maintain device management programs,” the report noted.

“Our research shows that money saved by companies on employee phones may not be worth what they give up, including greater access to employees and more business-focused apps on employee phones,” says Edward Cone, technology practice lead for Oxford Economics. “This doesn’t mean that every company should provide all workers with phones, but weighing the costs vs. the benefits and finding the right mix makes sense.”

Interestingly, the Oxford report also noted lower satisfaction rates among employees under BYOD policies compared with those where phones are provided. “Our conclusion, ‘companies that provide phones to some or all employees see measurable value in terms of productivity, ease of collaboration and the ability to get the job done in a timely manner. BYOD respondents report lower satisfaction rates with mobile devices as work tools.’”

One reason for the lower satisfaction might be the lack of a stipend, Cone says. “This financial help is increasingly common and obviously fair, so if employees are getting no support, they have reason to be upset. Beyond that, yes, BYOD employees are less satisfied with their phones as work tools because they get less access to applications, security and technical support.”

In the Oxford report, researchers suggested that companies think about mobility holistically, looking at the effectiveness of mobile workflow and company applications, as well as accessibility, security, the acquisition cost for devices, ongoing costs and the effects on company culture.

“Ultimately, mobile strategy is a leadership issue,” the report says. “Senior management decides who gets a phone and who does not at over half of our respondent companies. But there is no broad consensus on the best way of providing mobile devices to workers, and many businesses have not found the right approach to meet their strategic needs.”

In many cases, BYOD policies are driven by employees who might have better hardware and software tools at home than at work, preferences by IT-savvy people for certain favorite devices and employees downloading and installing software on company devices without permission from the company’s IT guru, Modica says.

An effective policy should contain three elements, including a software application for managing devices connected to the network, a written policy outlining the responsibilities of the employer and employee and an agreement that employees are required to sign, acknowledging that they have read and understand the policy, he says.

But even with those elements in place, there are numerous legal issues associated with BYOD policies, Modica says. For example, “How does an employer prevent trade secrets (including client lists) from being intercepted if an employee loses the device? How does an employer keep personal information about workers secure? What happens if an employee’s cell phone is infected with a virus that gets integrated into the company network? And what happens when the employee quits or is fired?”

Further, legal considerations surround the compensation question: “How does an employer control compensation for non-exempt employees who must be paid for every time they perform work, including when they use their cell phones for work?”

Companies can indeed install software in employee-owned phones that allows them to remotely wipe the phone, says Eva Del Rio, founder of HR Pro on Demand, a consulting firm focusing on the human resource needs of small business. But that should be included in a policy that is spelled out to everyone ahead of time.

“The policy should help employees understand that the convenience of using their own phone means there will be some tradeoffs in privacy,” she wrote. “Writing policy in a reactive mode means we’re always catching up to the problem, so be pro-active instead, design a policy that addresses problems before they occur and lets everyone know their responsibilities.”

Managers at Work is a monthly column exploring the issues and challenges facing managers. Contact Kathleen Driscoll with questions or comments by phone at (585)249-9295 or by e-mail at kadriscoll@aol.com.

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