# The New 9 to 5: Work in the iPhone Age

By Eli M. Kantor and Zachary M. Cantor

Ever-increasing connectivity has blurred the distinction between personal time and company time. Electronic communication has become routine at work and at home. For some it is now required. Employment and tort law have not yet caught up with the online workplace. And they still wrestle with whether an employee is on the clock while donning and doffing work-wear or commuting home from a conference. Still, such cases may guide companies through the dangers lying ahead. As more employees feel their work seeping through their mobile devices, employers should anticipate more problems-and communicate policies accordingly.

Consider this scenario: Before Mary buckles up for her morning commute, she checks her Blackberry and finds a message from her boss about an upset client. Mary thinks that she needs to respond immediately, and she spends the next 10 minutes dealing with her supervisor's message. This has become common for Mary — and, indeed, her employer requires that she be available at all times. Mary often must field similar calls and e-mails after work hours-and off the clock. Should the company pay Mary overtime wages for her electronic correspondence, and what about her subsequent commute to work?

Switching to her car's Bluetooth, Mary makes a follow-up call to the client while en route to work. Then, she hangs up and turns on the radio. But her mind is still on the conversation she just had. She runs a red light. Mary's car is T-boned. Twisted metal and shattered glass scatter. Airbags deploy. And a pedestrian is dead at the scene. Is Mary's employer liable for her absent-mindedness?

The recent case of *Rutti v. Lojack Corp. Inc.* (9th Cir. 2010) 596 F.3d 1046 is instructive. Mike Rutti installed car alarms for Lojack Inc. He was required to keep his cell phone on at all times and to drive directly between home and the job site without making any additional stops. After returning home, he was required to upload data obtained on the job from a portable data terminal to headquarters via the Internet.

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Citing the so-called "going and coming rule," the 9th U.S. Circuit Court of Appeals determined that Rutti's commute time was compensable under California law, but not federal law. Federal law provides that employers need not compensate employees for time spent traveling to and from where they perform their job duties. However, the 9th Circuit found that because Rutti's time was subject to the employer's control, Rutti had to be paid under California law. The court considered that Rutti might have to answer his mobile phone at any time and could not make additional stops while going to and from the job site (like dropping the kids off at the pool). To the *Rutti* court, the relevant question was whether the employee's time is "subject to the control" of the employer. If so, then the court considers whether the time spent on a particular function is *de minimus*.

According to the court, that Rutti kept his mobile phone on and did not deviate from his work route was *de minimus*. However, Rutti's 10 to 15 minutes per day spent uploading data from the portable data terminal amounted to significant work time, e.g. over an hour per week. Hence, that time was compensable under California law. However, under federal law, that time was not compensable because Rutti was relieved of all duties upon returning home-and could input the data at a time of his choosing.

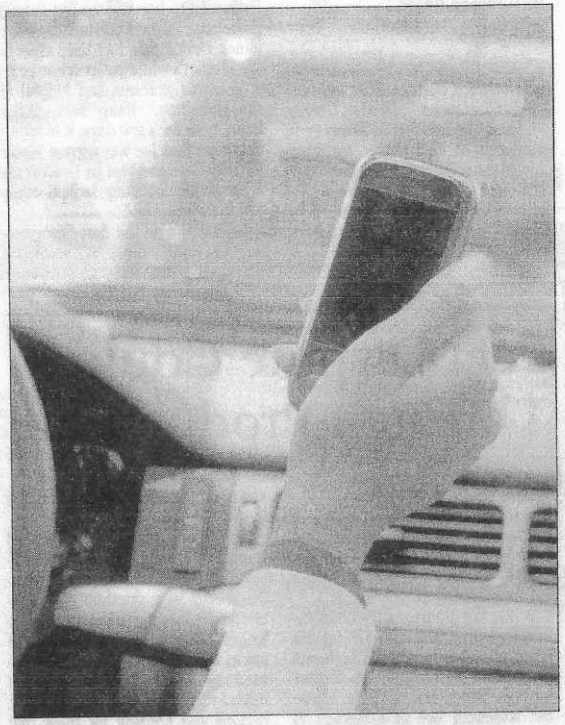
Rutti's portable data terminal is not so different from Mary's personal digital assistant (PDA). Nor is Rutti's commute unlike Mary's (save for the fatal collision). The same considerations are present for both: There was not a particular time the employee was to allot for the task; time spent using the device took anywhere from five to 15 minutes in each instance; it was a regular part of the employee's job duties; and the employee was at home while completing the task. Therefore, it might not be *de minimus*. That is why Mary's employer may have to pay Mary overtime for performing her task and her subsequent commute time, at least under California law.

Additionally, employer tort liability was recently expanded for an employee's negligence in *Jeewarat v. Warner Brothers Entertainment* (2009) 177 Cal. App. 4th 427. In *Jeewarat*, a vice president for Warner Brothers Entertainment returned home early from a company-funded business trip. His route home from the airport was similar to his route to work, but he did not stop at the office. Rather, he headed home first. But before he reached his abode, he smashed into another vehicle. Both cars struck three pedestrians-killing one and seriously injuring the others.

California's "going and coming rule" generally bars an employer's vicarious liability for an employee's negligence while commuting to and from work. However, the "special errand doctrine" prevails where the employer sends the employee on a special mission. Because Warner Brothers paid for the vice president's airfare, hotel, and other travel expenses to the convention, the entire trip was not concluded until he reached his home. The Court of Appeals held that an employer is liable for an employee's auto accident when the worker was returning home after an out-of-town meeting. "In addition," said the *Jeewarat* court, "When the employee intends to drive home from the errand, the errand is not concluded simply because the employee drives his regular commute route, but rather, the errand is concluded when the employee returns home or deviates from the errand for personal reasons."

In Mary's case, the deceased pedestrian's estate will argue that Mary was coming from a business meeting. While she was not required to board a plane, she did have to meet with the client over the phone and consult with her employer. Mary's supervisor sent the e-mail intending that she respond promptly-and, no doubt, follow-up with the client. Arguably, Mary was "subject to the control" of her employer. Mary was "sent" on a special mission — even though she did not travel anywhere to complete it. Further, the estate will argue that the "going and coming rule" does not apply, because Mary was ostensibly already at work.

These cases give companies ample reason to clearly communicate when and where employees should use their mobile devices. Electronic



devices are now so pervasive that people carry them like wallets — they Tweet, Google, e-mail, and chat while walking to lunch or driving to work. As *Newsweek* recently predicted in an article called *"L.A. Residential,"*

"In the year 2030, few Americans will toil in cubicles for eight hours a day. Instead, they'll write e-mails or take phone calls in sleek "collaboration centers" — large buildings equipped with Internet access, lounge chairs, and private spaces for one-on-one videoconferences. Employees will live, work, and play in the same complex...."

To many employees, that future is closer than the magazine asserts. But until it arrives, the nine-to-five paradigm may entail an employee's PDA act as a timecard-with overtime accruing for work done at home. And as fabulous as tomorrow's work place may be — with work "only an elevator ride away" — employees are already wary of the constraints on their off hours. The boundary between personal time and work time has all but disappeared. Between phone calls and e-mails, an employee's mobile device has quickly gone from a convenience to a nuisance.

The evolution of the workday will likely continue to bleed into the home through the employee's mobile device. Employers should have clear policies in place that detail when and where employees can use their mobile devices for work. Employers must also explicitly communicate to managers and employees that the written policy trumps verbal representations — to deter expression of contradictory expectations. Such policies will help prevent potential vicarious liability claims and overtime exposure, and put both employer and employee at ease.