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EMPLOYMENT LAW

It's a Brave New World: How Businesses Should Address New Technology in the Workplace

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With the exponential growth in electronic communications and computer networking, employers have more to deal with these days than just the economy as they try to keep abreast of advances in technology. Gone are the days when employers had to be alert only to harassment around the water cooler or negative remarks made during happy hour. Today employers have to keep up with e-mail, instant messages, blogs, Twitter, Facebook, LinkedIn and other social networks. This article will address the issues that arise in this brave new world and how employers can address them.

Issues

Generally, the issues presented by these new methods of electronic communication are the same issues that have always plagued employers. The difference is, however, that employees can inflict greater damage to businesses because of the speed and ease of publication to vast audiences and the difficulty of retracting information once it hits cyberspace. Similarly, the number of employees that can inflict damage to businesses has grown dramatically because anyone with access to the Internet can send information at virtually no cost. Given the potential for greater and more far-reaching consequences, employers would be well advised to protect themselves. Before addressing how best to protect one's business, it is worth noting some of the issues posed by this technology.

• Productivity drain. Research indicates that the majority of employees utilize their work computers, cell phones and handheld devices to send personal messages, access the Internet or review and post information on blogs or social networks. This new technology is more insidious than previous forms because it is difficult for employers to monitor. Employees may appear to be engaged in productive work when in fact they are utilizing their work equipment for personal use. In addition, the instant nature of such communication encourages employees to spend more time reading and responding to messages or viewing information online.

• Exposure to legal liability. Employers can be held accountable for information sent by employees regardless of the method of sending such information. Thus, harassing, offensive and defamatory comments in instant messages or blogs may subject an employer to liability.

• Breaches of proprietary information. Employees may intentionally or inadvertently leak confidential information or trade secrets because of the informal nature of this new technology. Given the speed and ease of publication to a wide audience, these leaks pose significant risks for employers.

• Damage to business reputation. Employees can inflict substantial harm to employers' reputations by posting critical, false or disparaging comments about their employers, vendors, customers or clients. Unlike other forms of communication, information on the Internet has the potential to be read by millions of people and thereby negatively affect an employer's products, services, goodwill and overall image.

Monitoring Communications

Given these risks, what can employers do to protect themselves?

• Workplace monitoring. In general, private employers may monitor employee computer communications. Indeed, in some industries, such as brokerage firms, broker dealers can be fined by the Securities and Exchange Commission for failing to retain records of electronic communications. Although some litigants and commentators argue that employer oversight of employee e-mail, instant messaging, blogging and Internet activity should be prohibited, courts generally have declared that private employers may monitor their employees' work e-mail and Internet activity.

• Non-workplace monitoring. With respect to non-workplace activity on non-work equipment, employers cannot monitor such activity. However, if employers become aware of inappropriate e-mails, instant messages or information on blogs, employers may have a duty to investigate and take prompt and effective action to stop such activity. Thus, employers would be well served to have a comprehensive anti-harassment policy in place that articulates that harassment of employees through any means will not be tolerated and may subject the harasser to discipline, up to and including termination.

Legal Constraints

There are a number of legal constraints employers should be aware of before implementing or enforcing policies regarding electronic communications.

• Whistleblower protection. Whistleblower laws such as the Sarbanes-Oxley Act and the Pennsylvania Whistleblower Law protect employees of certain entities when they expose illegal activity. Accordingly, if an employee posts information about his or her employer's alleged illegal activity on the Internet or in an e-mail or instant message, such activity may be entitled to protection.

• First Amendment. The First Amendment may be implicated in certain scenarios. For example, the First Amendment protects the right of individuals to communicate anonymously on the Internet. However, such protection is not absolute and must be balanced against the need for those who allegedly have been abused anonymously to have access to a remedy. Thus, where a prima facie case of civil or criminal wrongdoing has been shown, a court will usually order that the Internet service provider identify the anonymous author after notice and an opportunity to be heard. The First Amendment, however, does not apply in situations involving private employers. Therefore, if a private employer identifies an employee who has been sending offensive information by e-mail or instant message, that employee cannot utilize the First Amendment as a defense.

• Lawful use of lawful products/off-duty protection. Some states have statutes that provide protection for employees' off-duty conduct. Although these statutes were originally designed to protect smokers from discrimination, courts could embrace a broad reading of such statutes to protect an employees' off-duty electronic activity.

• National Labor Relations Act. Pursuant to the National Labor Relations Act, or NLRA, an employee may not be disciplined for discussing wages, hours or other terms and conditions of employment. This prohibition applies regardless of whether the employees are unionized. Further, the NLRA protects employees who "engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." The National Labor Relations Board has interpreted this provision to include e-mails sent among employees to discuss work hours, vacation policies and the general work environment. The National Labor Relations Board also issued advice memoranda indicating that policies limiting the use of company e-mail systems to business only were unlawfully overbroad and policies limiting (as opposed to prohibiting) personal use of work e-mail may be unlawful if vague, ambiguous or too onerous to apply. Accordingly, employers should be cognizant of the NLRA provisions and the board's guidance when drafting electronic communication policies.

• At-will employment. Pennsylvania is an employment at-will state. This means that employers can terminate the employment relationship at any time and for any reason, provided the reason for termination is not a discriminatory one. However, collective bargaining agreements, contractual provisions and statutorily conferred rights may provide exceptions to an employee's at-will status. Similarly, courts have been narrowing the at-will presumption by finding implied contracts in situations where employers foster an expectation of job security. To preserve the at-will presumption of employees, employers should ensure that all policies and handbooks contain language stating that none of their policies create an implied contract or alter the at-will status of employees.

• Accuracy of information posted on Internet. In several recent federal court cases, litigants used information posted on LinkedIn to support their causes of action. In *Kelly Services Inc. v. Marzullo* , involving a dispute over work for a competitor, Kelly Services cited an employee's description of his former position listed in the profile section of LinkedIn as evidence of his work responsibilities. See also *Asanov v. Legeido,* where a sole owner of company sued a former employee for trademark violation for claiming on LinkedIn that he was the owner and *Mohanty v. BigBand Networks Inc.* , where in a motion for the appointment of lawyer in a class action case the lawyer cited alleged misrepresentation made by another lawyer on his LinkedIn profile. Although the *Marzullo* case involved a lawsuit against an employee rather than an employer, it underscores how information posted on the Internet can be utilized in court. On a related topic, employers are beginning to post employee references on LinkedIn and other similar business networking services. This trend could expose businesses to lawsuits regardless of whether the information they post is positive or negative. For example, if the information about a former employee is positive, the employee might use it to challenge his or her termination or to prevail in an unemployment compensation action. If the information is negative, an employee could sue a former employer for defamation or interference with prospective contractual relations. Accordingly, businesses should consider providing only an employee's title and dates of employment.

Policies

It is critical for businesses to have written policies that cover electronic communications. A comprehensive policy on e-mail, instant messaging, blogging and computer use should address the following points: emphasize the potential reach and impact of information sent over the Internet; inform employees that they have no reasonable expectation of privacy regarding electronic communications in the workplace or when using workplace equipment such as cell phones, computers and wireless handheld devices; advise employees that they must not use electronic communications in any manner that is unlawful or contrary to the company's interest; inform employees that all electronic communications must abide by confidentiality or non-disclosure agreements; notify employees that they cannot use electronic communications to violate the company's anti-discrimination policy; instruct employees to use good judgment and common sense regarding all electronic communications and provide specific examples for guidance; apprise employees that electronic communications create business records requiring appropriate archiving according to applicable government and industry regulations and applicable company policies; caution employees that their electronic communications may be intercepted and their stored communications accessed; to avoid running afoul of wiretapping laws, employers should require employees to sign consent forms regarding workplace and work equipment monitoring; specify what will happen if someone violates the company's policy; inform employees that nothing in the company's policy alters the nature of their at-will status or provides a basis for an implied contract; and require employees to sign and date an acknowledgement of receipt form when they receive the company's electronic policy.

In addition to having a comprehensive electronic communication policy, employers should provide employees with annual training regarding the proper use of e-mail, instant messaging, blogging and the Internet. As part of this training, employers should keep attendance records. When managed properly, technological advances can maximize employee efficiency and effectiveness, bolster a company's profile and reputation and minimize the risk of negative exposure or litigation. •

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