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Personal Use of Workplace E-Mail: Friend or Foe?

They spend over 50% of their awake time at their place of employment, *they* often eat lunch at their desks, *they* make and receive personal phone calls, and *they* often use their employer's equipment and computers for personal use. But, should employees also be allowed to use their internal workplace e-mail accounts to trash their boss' plan for a divisional reorganization, to make dinner plans with friends, to look for a new job, or to send dirty jokes to colleagues?

From an employee relations perspective, the answer is that employer-permitted use of the internet by employees is probably a pretty good idea. After all, it takes perks of all types today to keep employees happy and, hopefully, somewhat loyal! So, if such contentment and loyalty can be derived from something as inexpensive as access to an e-mail account, it would appear that the answer is quite simple.

But, like so many other things in the world of business, this issue, too, comes with its shares of complications. The Electronic Communications Privacy Act of 1986 ("ECPA") directly prohibits the interception of e-mail transmissions by unauthorized individuals. And, while there is no specific prohibition in the ECPA for an employer to monitor the e-mail of employees, the ECPA does not specifically exempt employers either. Accordingly, as is the case with many issues presented by relatively new technologies, courts have been, and will continue to be, tasked with interpreting this law (any others) to find the appropriate balance between employee and employer rights.

While cases in this area continue to shape the law, it is incumbent on you to work within the parameters established, to date. It is also your obligation, however, to find the appropriate balance between your employees' rights to privacy, and the need to monitor their conduct to keep your business prosperous and humming like a fine-tuned engine! This can best be established by effectively communicating your company's e-mail usage policy to

your employees in the form of a policy statement or as part of a larger policies manual. When drafting such policies, extreme caution must be used to ensure that the employee fully understands what is permitted and what is not, and what type of e-mail monitoring they can expect from you, their employer. For example, if you intend on monitoring e-mail usage and content, be sure that the policy advises the employees whether personal communications will be monitored only to determine whether there is business content in the communication, or whether the monitoring may be more expansive. In the former example, a court may find that the employee did have a reasonable expectation of privacy and that the employer did not have an actual right to review the full text of the personal communication. Similarly, notice that communications might be monitored may have a significantly different legal affect than a notice stating that communications will be monitored. Finally, whatever policy you ultimately put into effect, be sure that the policy is properly explained to your employees, and that they sign the policy indicating their understanding and acceptance of its terms.

Failure on your part to effectively communicate an e-mail usage policy can result in an expectation of privacy on the employee's part. For example, such an expectation of privacy can be created if you are aware of the use of your e-mail system for personal communications among your employees and you allow the system to continue to be used for that purpose. Under these circumstances, an implied agreement is arguably created granting employees the right to expect that their private communications will not be monitored or accessed. Conversely, of course, you can expressly permit your employees to use your e-mail system for personal communications by informing them in policy statements or personnel manuals that this practice is acceptable. Employers looking for middle ground might consider enacting policies which provide that e-mail communications would not be monitored, unless you believed that the system was being used for activities harmful to the company.



Finally, whether you allow your employees personal access to your e-mail system or not, it is critical that you remain abreast of how these employees are using the e-mail accounts. Specifically, if your employees begin using the e-mail accounts in ways that may constitute a form of sexual harassment (i.e., as a means of disseminating tasteless jokes) and you do nothing about it, you may find yourself subject to liability.

Staying ahead of the law in technology-ridden areas is often easier than it sounds. Until the law fully develops, it is critical that employers find the appropriate balance between the goals and objectives of their company with that of their employees' expectation of privacy. This balance can best be accomplished by evaluating what type of e-mail policies are appropriate for your industry and documenting them in the form of a carefully drafted policy statement or as part of a larger policies manual.