

## **E-mail Policies for Employers**

By Julie Moore

In this fast world in which we now do business, e-mail and other forms of electronic communication are essential. Most other businesses and vendors with whom we do business have an e-mail system and expect the same from us. Most companies have made this investment and find it to be a useful, efficient, and now indispensable mode of communication.

Many legal issues, however, flow from its use. Yet, very few organizations have given thought to or implemented a written policy that covers the organization's electronic communications. Before it's too late, every employer should consider the pertinent issues involved and develop a policy that suits its needs – and protects it from liability.

When a company is “on line” its employees usually have access to e-mail and the Internet. Many companies have voicemail systems as well. According to studies, the majority of employees believe they have a privacy interest in their e-mail, Internet use, and the recordings left on their voice mailbox. Most employers, on the other hand, believe that their electronic communications systems are business property and they have a right to monitor them for a variety of reasons.

In the private sector, an employee's expectation of privacy is defined by the employer in its policies and practices. With no written policy, employees can argue that the employer is being overly intrusive of the employee's affairs if the employer deems it appropriate to monitor e-mail or Internet use. For example, most employees have passwords which can lead them to believe their messages are private. The following are just a few reasons why it may be advisable for an employer to review e-mail or Internet use:

- To ensure that proprietary information is not being disclosed to others;
- To monitor the performance of workers to ensure quality, responsiveness, and high productivity;
- To guard against graphic or offensive material being distributed that may violate the company's sexual harassment or unlawful harassment policies and which may be against the law;
- To control costs, ensuring that on-line time is limited to proper business activities; and
- To protect the entire system against being susceptible to viruses from foreign attachments.

Several elements should be included in an organization's electronic communications policy:

1. The company should expressly state that all computer and communication systems are company property.
2. Employees should know that all messages and transmissions composed, sent, stored, or received on the company's communications system are company property and should not be considered an employee's private property.
3. An employee's personal use should be expressly discussed. Some companies allow limited personal use, while others prohibit all non work-related communications. In any event, I suggest the policy reminding employees that use that is excessive or that interferes with business needs or normal operations is not allowed.

4. The company should republish the company's sexual harassment and anti-harassment policies, and state that such policies apply to all communications over the e-mail and voice mail systems.
5. Employers should advise employees that its systems are backed up and stored and that "deleted" messages are not removed from the computer system.
6. Employees should be advised that the electronic communication system should not be used to violate any law or company policy. This includes sending or receiving copyrighted materials, trade secrets, and proprietary financial information without proper authorization.
7. Employees should be warned that the company has the right to and will monitor its communications system.
8. All violators of the policy must know that they are subject to disciplinary action, up to and including termination.

In developing an electronic communications policy, employers should review other policies to ensure consistency with the company's philosophy and to ensure legal compliance. For instance, be sure that your harassment policy extends not only to sexual harassment, but to other forms of harassment, such as conduct based upon race, religion, national origin, disability, sexual orientation, age, and marital status. This policy should include an internal complaint procedure with the names or titles of persons to whom complaints should be directed. Also, every employer should ensure that it maintains written policies and procedures that are legally sound and currently reflect the employer's current operations.

An additional policy that should be developed in connection with the electronic communications policy is a policy on retaining stored e-mails. Many companies choose to retain e-mail messages for a set period of time and not longer. If litigation or a claim is imminent, however, companies cannot willfully destroy such files, because they could be used as evidence at trial. Applying a neutral, clear policy in advance of any potential or threatened litigation will minimize the time and expense that follows from reviewing and producing all communications during the discovery phase of litigation.

Employers should be reminded that all policies should be consistently enforced throughout the workforce to avoid claims of discrimination or favoritism. With clear communication and appropriate follow through, employees will have clear expectations of an employer's policies and practices.

Can employee supporters of unions and/or disgruntled workers of all types insist on a protected right under the National Labor Relations Act to air their grievances and solicit support from other employees by e-mail?

Recent case law and agency guidance under the Civil Rights Acts suggests that employers may be responsible for offensive material distributed by employees over company e-mail systems. In order to avoid claims of sexual and other forms of e-mail harassment, many employers have established policies limiting the use of computers and e-mail systems by employees. Employers

also have been advised to establish business-use-only policies for computers so as to preserve the right to monitor such equipment and avoid invasion of privacy claims. (See related article.)

At the same time, there has been an increasing use of e-mail by employees and outsiders, including union organizers, for purposes arguably protected by the National Labor Relations Act. Recent decisions by the National Labor Relations Board suggest that employers may be restricted in their ability to limit employee use of e-mail for such purposes.

These conflicting legal principles have left some employers frustrated in their ability to protect themselves from legal liability. Employers rightly feel that they should have the right to control use of their computer property, yet they are concerned that attempts to exercise such control may increase their legal exposure. A careful balancing of e-mail policies can avoid the most serious risk of legal exposure. Where an employer does not have a "business-use-only" e-mail policy in place, and an employee uses the e-mail for a protected purpose such as discussion of wages and other terms or employment, the NLRB has ruled that such employee conduct is protected by the Act.