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## Acceptable Internet & E-mail Use Policies

Increasingly in this age of technology, more and more businesses are running into problems caused by employee misuse of the company computer system. As a result of these problems, many employers are scrambling to install computer monitoring software and instituting harsh computer policies. When examining the cost of such measures the first question that comes to mind is, "why is this necessary?"

### SECURITY THREATS

The United Nations Committee on Crime and Criminal Justice has stated that employees are the greatest security threat to employers. There are several reasons the United Nations reached this conclusion: employee disclosure of trade secrets and confidential information; employer liability for harassment claims of employees; and employee comments in e-mail or on websites that could be the basis for harassment or defamation claims.

### DISCRIMINATION & HARASSMENT

A primary concern to employers should be the emerging use of e-mails as evidence of threats and harassment. See *Yamaguchi v. U.S.A.F.*, 109 F.3d 1475 (9th

Cir. 1996); *Zorn v. Helene Curtis, Inc.*, 903 F.Supp. 1226 (N.D.Ill. 1995); *Gibson v. American Library Ass'n*, 846 F.Supp 1330 (N.D.Ill 1993). In one federal case, an employee was awarded \$40,000 from her employer after receiving e-mails from a supervisor asking whether she wanted to have a "horizontal good time with" him. *Knox v. Indiana*, 93 F.3d 1327 (7th Cir. 1996).

### PORNOGRAPHY

A related problem with e-mail threats and harassment is the constant e-mail trade of dirty jokes and pornographic materials, which potentially open the employer to liability as the distributor. Many activists groups are calling for civil and criminal penalties for the mass distribution of unsolicited e-mail, and a few of these proposals would create liability for employers. Understandably some employers are attempting to prevent these problems; however, in one such case an overzealous employer, concerned about its liability for an employee using a work computer to trade child pornography, ended up being sued for invasion of privacy. See *Muick v. Glenayre Elec.*, 280 F.3d 741 (7th Cir. 2002).

### UNION ORGANIZING

Another concern regarding e-mail is its potential to be used as a union-organizing tool. The National Labor Relations Board has ruled that, if an employer allows the personal use of e-mail, it cannot prevent e-mail from being used for union activities. See *E.I. du Pont de Nemours & Co.*, 311 N.L.R.B. 893 (1993). The NLRB General Counsel has even gone so far as to argue that such employers cannot be prevented from using e-mail for personal reasons.

### DISCOVERY ISSUES

One final e-mail issue is the extent that electronic correspondence is discoverable in litigation. It is now generally accepted that e-mails are discoverable to the same extent as other corporate documents. See *Goldhirsch Group v. Alpert*, 107 F.3d 105 (2nd Cir. 1997); *EEOC v. Lockheed Martin Corp.*, 1996 WL 48528 (D.Md. 1996); *Monotype Corp., P.L.C. v. International Typeface Corp.*, 43 F.2d 443 (9th Cir. 1994). Therefore, not only have e-mails been used against employers as evidence of a hostile work environment, but also as evidence of employment contracts, fraud, and to show that reasons given

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for termination were merely pretextual. See *Goldhirsch Group v. Alpert*, 107 F.3d 105 (2nd. Cir. 1997)(e-mails as evidence of fraud); *Quantum Chem. Corp. v. Toennies*, 47 S.W.3d 473 (Tex. 2001)(e-mails as evidence of pretext); *Irwin v. Marquette*, 107 F.Supp.2d 974 (S.D. Ohio 2000)(e-mails as evidence of contract).

## INTERNET ABUSE

E-mail misuse is not the only major computer problem facing employers. Allowing employee access to the Internet is another area of concern. A report in *Business Week* found that over 70% of web traffic to pornography-related websites occurs during working hours. See 5 *Cyberspace Law* 2 (10/00). An employer's failure to consistently discipline employees visiting such sites can be costly. In Connecticut, a male employee's claim of gender discrimination was based in part on fact he was disciplined for viewing material from pornographic websites but females were not. See *Peralta v. Cendant Corp.*, 123 F.Supp. 2d 65 (D. Conn. 2000).

## DEFAMATION

As a result of the ease of publishing on the web defamation claims are another area of potential liability for employers. Defamation claims can result from inflammatory comments made by an employee on a competitor's website, at a public discussion group, or even an employer-related bulletin board. In one case, a court held that an employer could be liable for an employee's statements, even though they were made after working hours at a computer located off the worksite, when the employee posted harassing and retaliatory messages on the employer's internet bulletin board. See *Blakey v. Continental Airlines*, 751 A.2d 538 (NJ 2000).

## COPYRIGHT VIOLATIONS

The Internet also makes it very easy for employees to receive and use copyrighted materials, which, if incorporated into job-related materials, can leave the employer liable to claims for Copyright and/or Trademark violations.

## WHAT CAN AN EMPLOYER DO?

Given all these potential problems, what can an employer do to monitor its employees and limit its liability?

First, employers need to step carefully. The ACLU has made privacy rights in the workplace one of its highest priorities. Although private employers have a restricted right to

monitor employees, some states recognize a common law invasion of privacy claim by private employees. See *Zinda v. Louisiana Pac. Corp.*, 440 N.W.2d 548 (Wis. 1989); *Smyth v. Pillsbury*, 914 F.Supp 97 (E.D.Pa. 1996); *Anderson v. Low Rent Housing Commission of Muscatine*, 304 N.W.2d 239 (Iowa, 1981). As opposed to private employers, a public employer's right to monitor employees is subject to the First, Fourth, Fifth & Fourteenth Amendments. Therefore, public employees can sue for an invasion of their "legitimate expectation of privacy." *O'Connor v. Ortega*, 480 U.S. 709 (1987). Although this expectation of privacy includes many areas of the employee's environment, there is a disagreement whether this zone of privacy extends to e-mail. See *Smyth v. Pillsbury Co.*, 914 F.Supp. 97 (E.D.Pa. 1996); *United States v. Maxwell*, 42 M.J. 568 (U.S.A.F.Ct.App. 1995).

Second, any policy to monitor employees must not violate state or federal wiretapping laws, such as the Federal Wiretapping Act, 18 U.S.C. §2510, the Stored Wire Communications Act, 18 U.S.C. §2701, Iowa Code §727.8, and Iowa Code Chapter 808B. These laws create a general prohibition against monitoring communication transmissions. Although these laws apply to most e-mail sent to and received from outside sources, they may not apply to fully internal e-mail systems. See *Epps v. St. Mary's Hospital of Athens, Inc.*, 802 F.2d 412 (11th Cir. 1986). Regardless, wiretapping laws make it dangerous for employers to monitor employees without first consulting an attorney.

Although the wiretapping laws generally prevent the monitoring of most types of communication transmissions, the Federal Act (which contains language similar to Iowa's wiretapping law) does contain several exceptions. An employer is allowed to intercept any "readily accessible communications." For example, an employer can monitor a company-related bulletin board or e-mails sent company wide. In addition, employers have a right to access employee e-mail if the employer is the "service provider" of the e-mail system. *Bohach v. City of Reno*, 932 F.Supp. 1232 (D.Nev. 1996). Therefore, if the employer owns and operates an internal e-mail system, the employer can monitor and access its employees' electronic communications. However, this is a narrow exception and should be examined carefully before being relied upon as the basis of an employee monitoring policy.

Additionally, courts allow employers who use equipment routinely installable as part of its communication system to monitor employees "in the ordinary course of business." 18 U.S.C. §2510(5) (2001); *Briggs v. American Air Filter Co. Inc.*, 630 F.2d 414 (5th Cir. 1980). The problem with this exception has been determining what type of monitoring is allowable in the ordinary course of business. See *Epps v. St. Mary's Hospital of Athens, Inc.*, 802 F.2d 412 (11th Cir. 1986); *Watkins v. L.M. Berry & Co.*, 704 F.2d 577 (11th Cir. 1983); *United States v. Harpel*, 493 F.2d 346 (10th Cir. 1974). The Tenth Circuit has broadly held that, when employees are notified in advance that their communications may be monitored, there is no wire-tapping violation if the monitoring is for a business-related reason. See *James v. Newspaper Agency Corp.*, 591 F.2d 579 (10th Cir. 1979).

Third, get the employees' consent. Lowering an employee's privacy expectations can be done through the creation of privacy policies, the actions of the employer, and with the express or implied consent of the employee. See *James v. Newspaper Agency Corp.*, 591 F.2d 579 (10th Cir. 1979); *Griggs-Ryan v. Smith*, 904 F.2d 112 (1st Cir. 1990). The employer must make it clear that for legitimate business reasons employee computer files, Internet usage, and e-mail correspondence may be monitored. See *Faulkner v. State*, 564 A.2d 785 (Md. 1989); *Restuccia v. Bruk Tech, Inc.*, (Mass Sp. Ct. 1996); *Fraser v. Nationwide Mut. Ins. Co.*, 135 F.Supp.2d 623 (E.D.Pa. 2001). The employer needs to effectively lower the employees' expectation of privacy in advance. It should make sure employees understand that the employer owns all office equipment, and explain how the privacy policy is in compliance with all applicable laws and regulations. The employer needs to present the policy in writing and thoroughly explain it to all employees. Most importantly, the policy must be consistently maintained and enforced.

## SAMPLE POLICY

As mentioned above, an employer should be wary of prohibiting all non-work related email, even if that policy is uniformly administered since the National Labor Relations Board seems to view such policies as overbroad. An alternative is to prohibit non-work related e-mails during work time; however, the policy must be uniformly administered. This type of policy would allow for personal e-mails during breaks, lunch, and

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# COURT REFUSES TO DISMISS POULTRY WORKERS' OVERTIME CASE

A federal judge in Pennsylvania refused to throw out federal overtime claims against Tyson Foods Inc. by poultry processing workers who claim that the company violated the Fair Labor Standards Act by not paying them for time spent putting on, taking off, and cleaning protective clothing and equipment. Under the FLSA, the court said, activities are considered compensable if **they are an integral and indispensable part of the job.**

Because the evidence in this case was disputed, the court sent the issue on to trial. But the court did grant Tyson summary judgment on the employees' FLSA claims related to time they spent cleaning out their lockers, which took the workers only a few minutes each month, and therefore was de minimis and not compensable.

In an earlier case, poultry processor Perdue Farms Inc. agreed to settle a Labor Department lawsuit by changing its pay practices and paying current and former employees for the time spent putting on and taking off safety clothing and equipment. (*Chao v. Perdue Farms Inc.*, M.D. Tenn., No. 2:02-CV-0033, consent decree filed 5/9/02). The agreement settled a three-year dispute between the company and the government over whether employ-



ees should be paid for time spent "donning and doffing" safety attire.

The Department of Labor (DOL) has estimated that preparation takes eight minutes per day and the payment should amount to about \$500 per employee per year, resulting in a total amount of about \$10 million.

*Editors note The above cases highlight the cost of failing to follow FLSA rules or the failure of the Company to be aware of the rules. The following explains the Department of Labor's position on clean up and changing of clothes:*

- Time spent by employees changing clothes or washing up at the beginning or end of the workday is considered part of their "principal activities" whenever the changing or washing is required by the nature of the workers' jobs. The same is true where the clothes changing or washing is required by the employer's rules or by a statute or ordinance.
- Where employees change clothes or wash up before or after they start work for their own convenience, such activities are regarded as "preliminary" or "postliminary." In such situations, the time spent changing or washing would have to be counted as time worked only if payment is required under a contract, custom, or practice.

## Downsizing Slows, Severances Shrink

A study of corporate retention and severance practices conducted by Buck Consultants brought a glimmer of good news to America's beleaguered executives, and also raised a disturbing development. The good news: the pace of downsizing is slowly declining as compared to a year ago. The disturbing: the number of companies offering employment agreements that guarantee severance arrangements to their executives is down sharply from last year. Moreover, those offered severance terms are finding them significantly less generous.

Of the 81 survey respondents, about one in three (36 percent) had downsized within the past 12 months, down from 50 percent in last year's survey. Half of the downsizing

companies say that they plan additional layoffs in the year ahead - around the same percentage as a year ago. The encouraging news is that fewer companies than expected actually followed through on their second wave of downsizing last year.

Although downsizing does not appear to be over, it seems that the job cuts of the past year helped position major industrials for recovery. Durable goods manufacturers are more likely than other companies to have downsized in the last 12 months; more than 60 percent of survey participants did so. Only 20 percent of these companies anticipate further layoffs in the next year, however, a much lower rate than in other industry sectors.

While downsizing is becoming less prevalent, so is the protection afforded to executives by employment agreements. In last year's survey, 62 percent of the responding companies offered their executives contracts that spelled out various terms of their employment, including severance arrangements. This year, that number dropped substantially to 46 percent.

Further, the severance terms offered to executives are shrinking. For example, companies are reducing the maximum period over which severance is paid. Last year's survey showed the 75th percentile for severance duration was about two years, but this year the 75th percentile is one year.

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## SHORT FACTS

**UNEMPLOYMENT** - The national unemployment rate was 5.7% in August. The jobless rate was 4.9% a year ago. Iowa's unemployment rate for August was 3.7%. The Iowa rate one year ago was 3.4%.

**CPI** - The Department of Labor reported that for the 12-month period ending in August, the CPI-U increased 1.8%.

**CRISIS MANAGEMENT PLANS ARE FEW** - According to a study released September 4 by the New York-based American Management Association, more than half of employers surveyed do not have a crisis management plan in place to help themselves and employees recover from incidents like natural disasters, terrorism, or major fraud. 51 percent said they did not have a plan in place. Of the respondents with plans, only 41 percent had written policies and procedures.

**FEWER WORKERS ARE FINDING JOB SATISFACTION** - A study released by the Conference Board August 21 of 5,000 U.S. households found that workers are less satisfied with their jobs in 2002 than they were seven years ago. While half of those surveyed said they are satisfied with their jobs, that number is down from 59 percent in 1995.

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after work hours. With regard to the Internet, an employer should make sure that any type of company promotion, whether formal or informal, is pre-approved by a specific person within the company. Further, employees should be informed not to post any inflammatory or derogatory statements regarding competitors on the Internet. Also, employers should create a policy regarding the retention of e-mails or simply expand its existing document retention policy to specifically include e-mail.

In addition, a written copy of the policy needs to be given to every employee along with some type of training session. As with all written policies, it should include an acknowledgement form to be signed by the employee upon receipt. These and other types of policies are helpful in lowering an employee's expectation of privacy, as long as they are consistently enforced and the

employer takes prompt disciplinary action for all violations.

Finally, a notice screen should appear each time an employee logs onto the computer system. An example would be the following: "This computer system is the property of the employer and is intended to be used primarily for the employer-related business. Users are only allowed to access that data which they have been specifically authorized to access. All communications made through this computer system, as well as all data contained in the system are not private and must conform with the employer's electronic resource policy. For a copy of this policy, please contact the Human Resource Department.

Violations of this agreement or the policy will result in disciplinary action up to and including discharge.

By logging onto this computer, you the user gives your consent that the employer may

download, print, inspect, monitor, copy or disclose any e-mail, electronic communication or other data contained in this system at any time without further notice.

If you agree to this agreement and the employer's electronic resource policy, please type your user name and password to proceed. If not, log off this computer immediately."

Although this area of law is still developing, it is vital for employers to take action now to prevent themselves from becoming involved in the next big lawsuit. Obviously, every employer's situation is unique and this article is not an attempt to create a universal e-mail/Internet policy. There are other potential computer-related pitfalls facing the modern employer, and it is highly recommended that employers seek advice from an attorney or a human resource specialist when attempting to draft such policies.