

No Joking Matter

WITH NEW FORMS of communication—the Internet, intranets, e-mail, and Web sites—employers and employees are grappling with issues of privacy in the office. Employees' rights to send private communications through e-mail and an employer's responsibility to provide a safe and nonoffensive work environment are key issues being addressed by courts and legislators around the United States.

When an employee sends a potentially offensive joke through a company's e-mail system to a colleague, can that employee be fired? Does an employee have a reasonable expectation that e-mail sent from work is private? Can a company be held legally responsible for the actions of an employee sending offensive e-mail?

E-mail messages sent from one employee to another are assumed to be personal. However, in most offices, the e-mail travels through a company's computer network and is often inadvertently saved by the company and read by others. If the messages are offensive, such as racist or sexist jokes, the original sender of the message could be punished and even fired by the company. If the employer does not take action, it could be held liable for damages.

In January, a group of African American employees sued a large, Wall Street banking firm because allegedly racist jokes were sent regularly by employees via e-mail to other employees. The African American employees charged that the firm has control over its e-mail system and, thus, was responsible for the offensive jokes sent throughout the company.

In a 1996 case, a company fired an employee for sending personal and sexual e-mails to other employees. The company required its employees to sign a computer-user registration stating, "It is company policy that employees restrict their use of company-owned computer[s]...to company business," and the company read and monitored its employees' e-mail messages on an ad hoc basis. A court found the employer could legally monitor and review its employees' e-

mail, and that the employee had no reasonable expectation of privacy in his e-mail messages.

In another case, four female employees of Chevron sued the company alleging they were sexually harassed through e-mail. The case recently settled for \$2.2 million plus legal fees and court costs.

There are numerous issues affecting employers and employees regarding e-mail use by employees. The laws governing those issues are outlined in this column.

What is the law?

The Electronic Communication Privacy Act governs unauthorized access to and disclosure of electronic messages. The law prohibits "unautho-

■ *An employer
may monitor
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if the
interception
occurs in
the course
of business* ■

rized" access of electronic communication, and provides civil and criminal penalties for any person who intentionally intercepts, uses, or discloses any wire, oral, or electronic communication. Congress's original intent in passing the law was to protect employees from the interception and disclosure of communications, whether oral or electronic.

However, ECPA allows an employer to monitor e-mail communications if the interception is made in the ordinary course of business or with the consent of its employees. However, an employer must have a legitimate business purpose, and there must be minimal intrusion into employees' privacy. Monitoring all e-mails probably will not be allowed under the law.

Another issue that arises in e-mail-

related employment cases pertains to an employee's right to privacy. In many states, employees have a common law right to privacy, which prohibits an intentional intrusion upon the solitude or seclusion of another upon his or her private affairs, or an intrusion that would be highly offensive to a "reasonable person." However, most courts have rejected employees' arguments that employers had no right to monitor e-mail messages.

In a Pennsylvania case, an employee sued his former employer, Pillsbury, for wrongful termination. He claimed that Pillsbury promoted corporate communication via e-mail and assured its employees that e-mail could not be intercepted and used against employees as grounds for termination or reprimand. The employee relied upon the alleged assurances regarding the e-mail system, and sent threatening and distasteful e-mail messages from his home to his supervisor regarding Pillsbury.

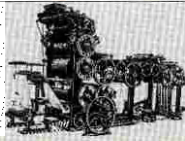
Pillsbury obtained copies of the e-mail and fired the employee. The judge found that the employee had no reasonable expectation of privacy in e-mail communications because they were sent over the company's e-mail system to another employee. The judge also concluded that even if such expectation of privacy existed, the interception of such communication would not be "highly offensive."

Employer and employee responses

An employer has a duty to protect its employees from harassing or otherwise inappropriate messages. Further, employers try to prevent conduct that is disruptive or harmful to morale. Once a company's management learns that "harassing" or "offensive" activities are occurring, it must take appropriate action. If it does not take appropriate action, it may be held liable for damages to an employee.

Additionally, there are numerous genuine interests that an employer may have for monitoring e-mail. Courts have found that any privacy interests that an employee may have are outweighed by the company's

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interest in preventing both inappropriate and unprofessional comments, as well as illegal activity over an e-mail system.

If a company expects to monitor its employees' e-mail regularly, it should require employees to sign a consent form that states explicitly that the company's computer and e-mail systems can be used only for business purposes and that they may be monitored on a regular basis. Further, the company should reserve the right to disclose the information on the company's e-mail system. Under ECPA, that would protect an employer from liability, as long as the

■ *Monitoring may lead to distrust, low morale, and an unhealthy and stressful work environment* ■

employer does not act too intrusively and monitors the e-mail for business purposes. However, a company that reviews its employees' e-mail and does not adopt clear and concise written policies regarding the use of e-mail may expose itself to liability.

At the same time, employees do not like their communications monitored. A company's monitoring may lead to distrust among employees, low morale, and an overall unhealthy and stressful work environment. Therefore, any actions taken by an employer must weigh the benefits and detriments to instituting an e-mail monitoring program.

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