



## **TECHNOLOGICAL ADVANCES VERSUS POLICY CONCERNS**

With the ever-increasing use of e-mail, voice mail, video-tape and other electronic means of communication in the workplace, employers are faced with yet another challenge: weighing employees' privacy concerns against the employer's interest in reducing inappropriate and non-productive use of company-provided technology. A recent survey conducted by the Electronic Messaging Association concluded that approximately 72 million people will be using e-mail by the year 2000. Undoubtedly, many of those individuals will also have access to the Internet. While these technological advances provide countless opportunities for employees to do fast, effective and productive work, they also lend themselves to abuse. Moreover, in recent years, the discovery of electronic messages has provided plaintiffs' counsel with the "smoking gun" kind of evidence that leads to large jury verdicts of settlements.

For instance, in a 1995 federal court case in New York, an employee's e-mail messages describing another employee as the "Spandex Queen," referring to himself as "President of the Amateur Gynecology Club," and forwarding a parody of a play called "A Girl's Guide to Condoms" was introduced as admissible evidence of a sexually hostile work environment and not as mere joking.

Last year, a federal court in Pennsylvania dubbed a supervisor's graphic electronic mail messages relating his sexual desire for the plaintiff and his evaluations of her appearance as "e-harassment."

Similarly, messages sent by an office manager to the CEO of a company describing another employee as "an old fart whose time has finally come" coupled with the CEO's response suggesting that the company downsize "as an opportunity to get rid of some old, dead wood that's been around for too long," served to defeat the employer's motion for summary judgment in an ADEA claim.

So what is a prudent employer to do? At a minimum, all employees and especially supervisors should be reminded to exercise the same degree of care in the sending of e-mail and voice mail messages that they would use in drafting a letter or interoffice memo. Like any written document, those messages are discoverable during litigation. Employees need to be informed that even after e-mail has been "deleted," it is often retrievable. Additionally, employers should consider monitoring their employees' use of electronic communication to guard against inappropriate use and abuse.

Many employers are using some means of monitoring to track and record electronic transmissions sent and received by employees in the workplace. Telephones, computers and voice mail may all be monitored. However, in order to avoid potential invasion of privacy claims, monitoring is governed by a federal law known as the Electronic Communications Privacy Act (ECPA). The ECPA prohibits an employer from intentionally intercepting its employees' electronic communications. An employer may avoid liability under the ECPA



through one of two ways: (1) if the employee gives his express or implied consent; or (2) if the monitoring is done for a legitimate business purpose, such as to ensure proper customer service or for maintenance or repair.

The least problematic approach and the one providing the greatest protection against both an ECPA claim and a potential state law invasion of privacy claim is to obtain the employee's express consent through the development of a company-wide policy on e-mail, voice mail, the Internet, and other electronics communications. Many companies require employees to sign a written agreement to follow the policy. Courts have held that when employees are aware that their e-mail and other electronic communications are subject to being read by the employer and have signed a statement agreeing to restrict their use of company-owned hardware and software to company business, an employee has no legitimate expectation of privacy and consequently cannot make out a claim for invasion of privacy under state law.

**An effective electronic communications policy should state:**

- that communications and information stored on company information systems are property of the company and subject to inspection;
- that the company has the right to access material stored on the system;
- that electronic communication should be used solely for business purposes;
- that the drafting or sending of any offensive messages, jokes, or slurs, including those that may violate the company's anti-harassment policy, is strictly prohibited;
- that even after e-mail has been "deleted," it is often retrievable;
- that accessing or downloading inappropriate material is prohibited.

If your company does not have a policy governing the use of electronic means of communication in the workplace, we strongly encourage you to draft one. Please feel free to contact any of our offices for guidance in drafting a policy that best suits your company's needs.