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The Electronic Tsunami: Don't Get Caught In This Wave!

By Thao Tiedt

Employees Twitter and tweet. They are on Facebook, MySpace and other social networks. Often, despite a company's carefully drafted policy to the contrary, they treat the company electronic services as an extension of their social networks. E-mails fly, often with disastrous results later.

Where can a company draw the line? An employer has the right to control and monitor an employee's use of the employer's communication devices, including internet, cell phones, voice mail and computers. However the employer should have a carefully drafted policy that informs employees of the company's ownership of anything, even personal communications, which utilize employer-provided electronic devices. If the company intends to or wants the option of monitoring usage, the policy should include that information.

What employee rights may be implicated? Employees may argue that employers should not control or monitor their communications utilizing company devices since people in America have freedom of speech and a right to privacy. In the private employer setting, however, an employee does not have freedom of speech. The Bill of Rights of the Constitution, including the First Amendment, only provides that *the government* may not impinge unnecessarily on free speech. Since a private employer is not a governmental entity, the private employer can limit free speech in the workplace. The right to privacy is a more delicate matter. Generally the employee must have an expectation of privacy before any privacy right is implicated. If the employer's electronic services policy clearly states that the employee should have no expectation of privacy when utilizing employer provided communication devices as all communications become the property of the company, the employee who pleads invasion of privacy will usually not prevail.

What liability could the company have for an employee's harassing, offensive or defamatory comments using company devices? Employers can be held accountable for such information sent by an employee, particularly someone in the managerial or above level, if done on a company electronic service. Liability is much less clear if the employee's communications are from a personal electronic device during personal time. However, if the employee is utilizing information gleaned from the company in the personal communication, the company could be implicated. The company would then have a duty to investigate and take appropriate action.

What about messages/cartoons/pictures that espouse particular religious, political, ethnic, gender or racial opinions or viewpoints? Such items have no place on company electronic devices, particularly if they are sent by anyone with managerial authority. These are not business communications and can present an untrue picture of the company's value system as a whole. Unless the Board of Directors or top officers of a company have decided that the company should take a particular public stance on an issue, employees should keep their opinions on these areas to themselves when using the company provided electronic services.

Can't employees, including managers and executives, send the above type messages to their "safe list" of people who they know have the same opinions or viewpoints? *There is no such thing as a "safe" list within a company or when using a company provided electronic service.* While a person may think he or she knows the beliefs of

other employees, family, friends or customers, those people may not object to opinions they actually find offensive in order to avoid an uncomfortable confrontation about conflicting values or opinions. *Managers have to realize that if their "safe" list includes anyone lower than they in the company hierarchy it is likely that opinion based communications will someday come back to haunt the manager.* This is true because, more often than not, the manager will someday have to take some type of adverse action against someone on the "safe" list. That employee will then claim that he/she was subjected to a hostile racial/gender/ethnic/religious environment but didn't report it because the offensive materials came from a person with the power to harm the employee's career. *Employees, and particularly managers, also have to realize that someone on the "safe" list may very well forward the opinion communication, complete with the company information as the originating party, to people outside the "safe" zone.*

Can the company restrict the employee's references to the company when it's on the employee's own time and personal e-mail? The company can restrict the use of company information, particularly confidential information or trade secrets, whether on a company provided device or a personal device. Make sure every employee signs the company confidentiality/trade secrets policy or agreement and make sure the policy or agreement includes a warning about even mentioning such information in blogs, instant messages or other non-business communications.

What if the company does not mind if an employee discusses by whom he or she is employed but only if the site is appropriate? A company could restrict employees from mentioning by whom they are employed unless it is on a company approved site such as LinkedIn. However, enforcement of this policy would be difficult and even handed enforcement particularly time consuming. The better policy is that the company prohibits employees from mentioning their employer *unless it is on a site provided by the company to the employee on the company electronic devices.* That way a company could provide LinkedIn to the employees for business purposes but prohibit employees from discussing the company on MySpace or FaceBook. However, employment counsel should be contacted before the company issues such a prohibition since some states have statutes that protect employees' private activities.

What if the employee is trashing other employees or the company on a social network? If the company either discovers such information or receives a report about such information, the company should investigate the situation and take appropriate action against the employee. At the very least, trashing the company on a social network shows the employee lacks judgment and doesn't care much about the entity providing the employee's livelihood. This lack of loyalty and judgment would warrant termination.

What if the company is sued by someone who has been libeled or otherwise defamed on a social network by an employee using the company electronic services? The company should immediately contact its insurer. General Liability coverage usually contains a provision for Personal and Advertising injury. A wise company will consult its insurance broker *before* such a claim is made to be sure the company would be covered for such a claim if one happens in the future.