

The Impact of Technological Developments On the Workplace

Part One of a Two-Part Article

By Roy A. Ginsburg

Technology changes in the last decade alone have profoundly changed American society. Our modes and methods of communicating have been transformed. Purchasing patterns have been radically altered by the Internet. Social networking has moved into the digital world. Given the way technology has driven these and other significant societal changes, it was inevitable that these developments would permeate the employment environment, with immediate consequences both for those who manage a corporate workforce and employment law practitioners.

This two-part article examines several different contexts where changing technology is affecting the workplace and presenting new, and sometimes unique, challenges to Human Resources professionals. At times these situations may require novel solutions. In most instances, however, they can be thoughtfully addressed and resolved by reliance on principled analyses developed in parallel settings with which the skilled manager, HR professional, or employment attorney already is familiar.

E-MAIL

Virtually every company is now entirely dependent on e-mail communications.

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Although e-mail provides many benefits, e-mail communications also are implicating intriguing legal questions. As with most aspects of employment law, if these questions are contemplated carefully before a problem arises, a company will be better positioned to address these issues than it will if reacting only when an unanticipated problem occurs.

E-MAIL COMMUNICATIONS GENERALLY

E-mail exemplifies the “blessing and curse” characterization. Although it facilitates and speeds communications, the ease and speed of this medium is itself a problem. Few among us have not regretted hitting the “Send” button just a bit too quickly. This may reflect that the e-mail was sent when one was angry or emotional, or simply had not given sufficient thought to the issue addressed. Emotional or ill-considered communications (the words, emphasis and tone) can become critical evidence in employment litigation, such as hostile environment, discrimination or defamation claims.

E-mail has the illusion of privacy, appearing as just a more advanced medium for sending information that historically might have been contained in a letter. To the contrary, e-mail is often a very public medium; a “private communication” can be forwarded to thousands of recipients with a few keystrokes by the initial recipient. This potential ups the ante in a variety of employment contexts, including claims for harassment, defamation, intentional infliction of emotional distress, etc.

E-mail also presents issues related to its function as a transmission mechanism, a vehicle for transporting attachments. Vast quantities of data can be transmitted in an instant to numerous recipients. Unfortunately, the disseminated data may include confidential, proprietary and trade secret information. E-mail presents its own unique problems for civil litigation, which litigants and the courts are struggling to address. With ten minutes of concentrated thought, lawyers can craft discovery requests to which the costs of responding are enormous. E-mail also can present unusual, more specific issues, affecting the employment law practitioner.

E-MAIL AND THE ATTORNEY-CLIENT PRIVILEGE

If an executive, anticipating termination or some other adverse job action, communicates with her private counsel via the company’s e-mail system, are those e-mail communications encompassed by the attorney-client privilege? Is a company free to peruse those communications, especially when it has a well-publicized “E-mail Policy” proclaiming that the e-mail system belongs to the company, disclaiming individuals’ privacy rights, and stating the company reserves the right to monitor the communications at any time?

Barring intentional or inadvertent waiver, the substance of communications between an individual and her lawyer is encompassed by the attorney-client privilege. Had the executive sent a letter to her lawyers seeking guidance on issues relating to the discharge decision, the company would not have been able

to obtain that letter in discovery. If the company had inadvertently received that correspondence because it was misaddressed, it would have been obligated to return it unread. Does a different analysis apply because the transmission medium is e-mail? At least one court has answered that question affirmatively. In *Scott vs. Beth Israel Medical Center, Inc.*, No. 602736/04 (New York Supreme Court; Oct. 17, 2007), the court found that a fired employee who communicated with his private employment law counsel via the company's e-mail system did not have an "expectation of confidentiality," and had waived the attorney-client privilege. The employer in the *Scott* case had an e-mail policy that provided for the possibility of employer monitoring, a fact on which the court relied in reaching its decision. Beth Israel's policy also prohibited the use of the company's e-mail system for personal reasons. As described by the court, Beth Israel's e-mail policy states that its e-mail system "should be used for business purposes only," that documents sent over the system are the property of the medical center, that employees have no personal privacy rights in such material, and that the medical center "reserves the right to access and disclose such material at any time without prior notice."

The court also rejected the notion that the standard disclaimer language at the end of the e-mails from the law firm back to the executive created an expectation of confidentiality. "When client confidences are at risk, [the law firm's] pro forma notice at the end of the e-mail is insufficient and not a reasonable precaution to protect its clients." Thus, the attorney-client privilege was not available for the e-mails either to or from the law firm and the company was entitled to review these communications.

E-MAIL AND UNION ORGANIZING

Another context in which e-mail recently has received attention is union organizing. Is it permissible for a union representative or an employee advocating

union participation to communicate via the company's e-mail system?

The National Labor Relations Act (NLRA) recognizes a series of employee rights, including "the right to self-organization, to form, join or assist labor organizations ... and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection" The Act likewise provides that an employer may not "interfere with, restrain or coerce employees in the exercise of the rights guaranteed" Nor may an employer "by discrimination ... encourage or discourage membership in any labor organization" Over the years, the NLRB has developed an intricate set of rules concerning "solicitation" and "distribution" activities by employees in the workplace, attempting to balance the rights of employees to organize with the employer's legitimate right to maintain control of its premises. The NLRB generally has found employer rules restricting union solicitation or distribution during periods when employees are expected to be working to be presumptively lawful. However, an employer violates the Act if it fails to enforce a valid no-solicitation rule against other similar activities, while simultaneously enforcing the rule for union-related solicitation or distribution. Thus, selective enforcement of even valid no-solicitation/no distribution rules to preclude union-related activities has uniformly been held to constitute a violation of the Act.

In recent cases, the NLRB's General Counsel argued that company-provided computer systems (including e-mail systems) are a "workplace" themselves and that employers may limit employees' rights to utilize such systems to engage in solicitation or distribution in support of union activities only by proscribing such use during "working time." The General Counsel contended that an employer's ban on the use of its computerized e-mail system to engage in solicitation or distribution on behalf of a union which

applies, on its face, without regard to whether the employee is on working time, is overbroad and violates the Act even if uniformly enforced against all non-work-related use.

In the case of *Guard Publishing Company*, 351 NLRB No. 27 (Dec. 16, 2007), the Board rejected this analysis. In a 3-2 vote along party lines, the NLRB considered for the first time the question of how employees' use of their employers' e-mail systems relates to their rights under the NLRA. The Board found that an employer's e-mail system was akin to other company property (e.g., bulletin boards, copying machines, telephones) to which employers traditionally have been able to restrict employee access. With that predicate, the NLRB held that employers may restrict the non-business use of its e-mail systems, including activities relating to union organizing, in the same way it restricts access to other company property. The Board also found that an employer is free to choose what types of communications it may allow or disallow on the company's e-mail system, so long as the distinctions are not made along the basis of Section 7 of the NLRA (the right to organize section). This controversial, highly publicized opinion, is now on appeal, and should be monitored carefully.

THE INTERNET

Just as e-mail has created both general and specific problems for the work environment, so too has the Internet. Like e-mail, the Internet provides incredible advantages for the work environment, providing access to nearly infinite information and resources. Unfortunately, the Internet's facile access and its content breadth also present both mundane and unique problems for the work environment.

There is the simple question of how much time employees spend on the Internet, pursuing activities that have little to do with the corporation's income-producing efforts. How does the distraction of the

Internet affect productivity and how can it be regulated effectively without near-constant monitoring?

As referenced above, the Internet is a vast smorgasbord of information and images. With just a few keystrokes, that data and those images can be imported into the work environment and widely disseminated among co-workers. Regulating the electronic data brought into the workplace is not an easy task (although reconstructing what was introduced into the work setting — precisely when and at which computer — may be easier than most employees realize). Employees' ability to introduce content and images electronically from around the world — whether appropriate or inappropriate — into companies' computer systems has many ramifications for employment issues, in the sexual harassment area and many other contexts.

In addition to the general backdrop issues implicated by Internet use in the workplace, this new medium creates some unusual situations which would have been unheard of just a few years ago.

EMPLOYEE INFORMATION PLACED ON THE WEB

For example, an employee at one of our clients discovered, simply by Googling his name, that a co-worker with whom he had a strained personal relationship had been putting crude, sexually graphic statements about him on the Web. The offending employee was accessing the Internet by using the company's computer system. When discharging the employee who had engaged in this conduct, the company relied on a number of its policies, including its prohibition against sexual harassment and its privacy protections. The company's decision also was supported by its clearly defined and well-publicized policies regarding use of the company's computer equipment, which emphasized: 1) ownership of the equipment resided

with the company; 2) the equipment was only to be used for business purposes; 3) certain uses of the equipment were prohibited, including the dissemination of sexually explicit data or information that is offensive or defamatory; and 4) employees had no expectation of privacy with regard to communications they made utilizing the company's equipment.

In this odd situation, the employer also was able to analogize the offending conduct to other types of proscribed communications. Had the comments posted on the Web been made orally to co-workers or displayed on a company bulletin board, few would have questioned the employer's right to discharge the offending employee. The fact that the employee elected to use the Web as his medium did not alter the analysis. Indeed, this method of publication exacerbated the seriousness and severity of his actions.

COMPANY INFORMATION PLACED ON THE WEB

It is not just personal information that employees display on the Internet, whether about themselves or others. Employees also may use this medium to publicize company information, with potentially devastating consequences.

Leaked information regarding a company's confidential financial data (especially in the black-out periods preceding financial disclosures, or in connection with M & A activities), or the public revelation of critical trade secret information, whether done maliciously or inadvertently, can adversely affect a company, deflating its market capitalization or harming its competitive position. Policies addressing these issues need to be well formulated and publicized. Employees need to understand the ramifications of this conduct. At the same time, employers need to take precautions to guard against this type of disclosure.

PORNOGRAPHY

The pervasiveness of pornography, and its accessibility via the Internet, presents its own challenges for employers. The federal courts in California confronted an unusual fact pattern when the police suspected a company's employee of using the company's computer system to send and receive illegal pornographic images of children. The question the courts had to resolve was whether the employee had a protectable Fourth Amendment privacy interest in the computer he used at work, requiring the police officers to obtain a search warrant to obtain access to the computer. *See United States v. Ziegler*, 9th Circuit, No. 05-30177 (superceding opinion filed on Jan. 30, 2007).

Initially, the Ninth Circuit held that an employee could not have expectations of privacy in the company's computer system, given company policies regarding the use of these computers. Upon reconsideration, however, the Ninth Circuit revised its opinion, concluding that even in the context of company-owned computers and appropriate company policies, employees could have a protectable Fourth Amendment interest, mandating the need for a search warrant. However, in its revised opinion, the Ninth Circuit also found that the employer, as the owner of the computer equipment and the party regulating access to its premises, was authorized to give "consent" to the search, obviating the need for a search warrant.

Next month: Protecting a company's assets.