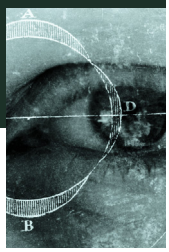


EMPLOYMENT

by CHRISTOPHER E. COBEY

Digital Workplace Pitfalls

Staying in charge of the tools you provide

Littler Mendelson

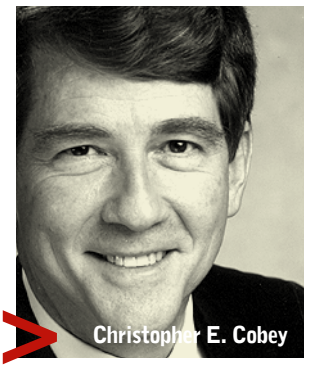
TODAY'S TOOLS OF THE TRADE INCLUDE E-MAIL, voicemail, cell phones, personal digital assistants (PDAs), instant messaging (IMing), and websites. Used properly, they enhance productivity and heighten a company's image. Used inappropriately, the same tools can lead to litigation, liability, and losses.

POTENTIAL ABUSES AND NEGLIGENT USES

Top management must work hand-in-hand with corporate counsel to monitor employee activity, which, if unchecked, could develop into exposure to employee or third-party lawsuits in the digital workplace (see sidebar "Employee Abuses"). Courts have repeatedly ruled that where employers provide the means and the access to the Internet, employers are also responsible to ensure that their hardware is used for their intended purposes. Therefore employers cannot be passive or simply expect that employees will not abuse these tools. If a company does not disseminate electronic resources policies, provide training on these policies, or conduct random spot checks of employees' hard drives, laptops, and voicemail, employees may believe that their e-mail and voicemail are private. Each corporate employer must also be aware of the application of any privacy expectations existing under federal or state constitutional, statutory, or case law.

The outer limits of an employee's right to privacy in the workplace are in blogging. When a computer programmer mentioned in her personal blog that her employer had improved one of its products, the company apparently took the comment as a criticism of its previous product and fired her. The extent to which an employee's free speech and privacy rights trump the employee's duty of loyalty is untested. Employers should carefully consider whether or not they wish to be a test case in this area by taking similar actions.

Entry-level employees are not the only offenders in misusing electronic tools. Recent investigative and legal actions brought by New York State Attorney General Eliot Spitzer against insurance brokers highlight how a manager's e-mail can become powerful evidence—especially those e-mails dashed off without thought, or as a joke. E-mail takes on a whole new identity and gravity when it is presented as evidence in a courtroom.



Christopher E. Cobey

Allowing IMing at work carries its own unique dangers. Many of today's new employees see IMing as part of their culture, which they expect to continue engaging in when they enter the workplace. The facility and informality of IMs, even more than e-mail, tempt employees to respond instantly and candidly, writing things they might not say in public. Like e-mails, IMs can be retrieved and used as evidence.

Another risk is allowing employees to use Internet access at work to send and receive messages from personal e-mail accounts. Employees may incorrectly believe that employers may not legally or electronically review such "personal" e-mail use. However, it is the employer's obligation to inform the employees so that a reviewing court or jury does not deem reasonable their possible expectation of privacy.

MANAGING THE RISKS

Management's challenge is to be proactive in overseeing the company employees' use of electronic tools. For starters, management should:

Identify the tools it provides to employees and specify restrictions on using them. If a company-provided cell phone can take pictures, under what circumstances may an employee use that feature? May an employee use a company laptop to download Internet content without restriction?

Develop policies detailing when and how those tools may or may not be used. If a company wants to reserve the right to monitor employees' e-mail, voicemail, and Internet usage, put notice of that right in company policies to avoid liability. Although few jurisdictions require advance notice, more are considering such requirements.

Train managers and employees on the electronic resources policies. Great policies are worthless if the employees are not aware of them. With both in-person and online training options available, employers look foolish at trial when the employee testifies: "I was

never told that we even had a policy on that." Structured, verified training can help prove not only that what an employee did was wrong, but also that he or she had been specifically instructed in the policy before committing the wrong. With such evidence, the company might be dismissed from the lawsuit, leaving the offending (former) employee as the sole target of the plaintiff's litigation.

Enforce the policies. Every employment trial or arbitration addresses the question of fair treatment by the employer. Fairness, especially to a jury, is not only having a clear policy and communicating the policy to supervisors and employees alike, but also enforcing the policy in an even-handed manner. To terminate one employee for an offense for which another employee received only a written warning irritates judges and enrages juries, which means that the employer will literally pay the consequences.

Have a document-retention policy. The Federal Rules of Civil Procedure, as well as many federal district courts' rules, are being modified to make the process of seeking access to an employer's e-mails, voicemails, and IMs more routine. The cost of these searches can be substantial—hundreds of thousands of dollars—and the courts are hardly unanimous in how they allocate the cost of complying with a plaintiff's discovery demand. Even if a plaintiff initially pays a portion of the retrieval costs, the employer must review every e-mail, voicemail, or IM that might be disclosed to determine whether some privilege could justify its nondisclosure. These pre-production privilege reviews can cost tens of thousands of dollars in time.

Proactive employers are drafting policies addressing the storage and deletion of electronic records, including the obligation to segregate or otherwise identify privileged communications that could be withheld from subsequent discovery requests.

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Ignoring one or more of these steps is an invitation to let a judge or jury make the decisions that managers should have made in the first instance. And juries are composed almost entirely of employees. Very rarely will a plaintiffs attorney allow a supervisor or manager to sit on a jury.

A company must take a proactive approach to limit exposure to unnecessary liability. If an employer's electronic resources policy is not current or misses some of these issues or—worst of all—is nonexistent, the next knock on the door may be a process server with a summons and complaint. ■

EXPERT ADVICE

EMPLOYEE ABUSES

Corporate vigilance is required to confirm and ensure that employees are not using the employer's hardware and software for non-business purposes. Here are a few examples of employee abuse:

- A national chemical manufacturer fired 75 employees and disciplined 435 others for violating the company's digital resources policies. The offending employees had been using the company's Internet access to download pornographic and violent images, and to distribute that material to other employees and to persons outside the company.

- A global equity trader newly assigned to a foreign office sent an e-mail to his stateside office colleagues with the subject line "Living Like a King." His e-mail detailed his avid pursuit of the joys of the flesh (including his incipient exhaustion of his formerly large supply of condoms). His e-mail was circulated worldwide in a matter of days, to the company's embarrassment.

- A major law firm was sued, along with its associate attorney, for wrongful death and other torts when the attorney struck and killed a pedestrian while allegedly using her employer-provided-and-financed cell phone to discuss legal work – after the attorney had left a dinner with a client during which she consumed alcohol.

BIO

CHRISTOPHER E. COBEY is resident senior counsel in Littler Mendelson's San Jose office. He has extensive litigation experience in state and federal courts and before administrative agencies in a broad range of employment and labor matters, including wrongful termination cases; breach of contract disputes; and race, gender, age, and disability discrimination and harassment lawsuits. Mr. Cobey also advises clients regarding compliance with applicable state and federal employment and workplace laws. He frequently writes articles, conducts training sessions, and presents bar association seminars on current employment law topics. He received his J.D. from the University of California at Davis School of Law (King Hall). **ccobey@littler.com** or **(408) 998-4150**