

HR “obligated” to teach management e-mail’s legal pitfalls

A10 HR•News Conference Daily

Society for Human Resource Management

Tuesday, June 27, 2000

By Leigh Rivenbark

HR professionals must create tough, written policies about e-mail usage and teach managers that e-mail can become damaging evidence in court, employment law attorney Janet Goldberg McEnery said during a “rise and Shine” session Monday morning.

E-mail is a “smoking gun” that can be discoverable evidence in lawsuits, McEnery said during her presentation, “The Electronic Workplace.” She cited suits in which employees tried to use e-mails – by supervisors, by top managers or by co-workers - as evidence of discrimination or harassment.

McEnery’s solution: Stop the damage before it starts.

“Monitor [e-mail usage], but only after you give employees express written notice that they will be monitored,” she advised. Have employees sign the notice, to show that they are aware of possible monitoring, and repeat the notice occasionally. E-mail policies should clearly prohibit sexual harassment, defamation or offensive content.

Employers should give reasons for the monitoring policy, rather than just

announcing it without any justification, added McEnery, who is an attorney with the Tampa, Fla. Firm Macfarlane Ferguson & McMullen. “Give reasons [such as], ‘We’re going to be looking at your e-mails for training purposes...to prevent sexual harassment...for business purposes.’”

Employers still may run afoul of wiretap laws or privacy laws, McEnery said, adding that one way to protect against wiretap or privacy allegations is to get employee consent. Where an employee has signed off on a policy, it is harder for the employee to claim that the employer illegally tapped his communications or invaded his privacy.

Another safeguard, suggested by an audience member: Program a warning that appears every time your employees log onto their computers. The warning informs the user that the system is for business use and that the employee may be liable for other use. McEnery praised that tactic and said that when the user clicks on the warning to close it and move on, the employee is effectively acknowledging the policy. But such an onscreen warning should be in addition

to, not in place of, a written policy.

HR has an obligation to teach managers and supervisors that their e-mails—including materials like drafts of termination letters—are not necessarily confidential and can be dug out of electronic trash cans long after deletion, McEnery said.

“[Supervisors] think of e-mail as a regular old telephone conversation where they type the first thing that comes into their minds.” McEnery said. “They also don’t know that when you press the button to delete, it doesn’t really delete.”

Not everything about e-mail is bleak for employers. Just as employees can use e-mail as evidence against their bosses, so can employers use e-mail in their own defense, she noted.

McEnery cited the example of an employee who tried to sue his employer for discrimination after being fired for poor performance. A check of the employee’s computer records showed that he used his work computer to run a personal business and used work e-mail to contact his clients. The discrimination charge collapsed and the employer justified firing the employee.

Employers and their attorneys should remember that e-mail can be fabricated or altered and should look for such fabrications if an employee bases a case on e-mail.

For example, an employee accused her company’s president of sexual harassment, a charge he denied. The employee faked and backdated in e-mail, containing graphic sexual references, and made it appear as if the e-mail had been sent to her by the president. Because the company uncovered the fabrication, the employee was convicted of falsifying evidence.

Employers can set up “no solicitation” policies prohibiting any outside organization from soliciting employees on office e-mail, but those policies must apply equally to all groups, McEnery said. Employers cannot use “no solicitation” policies to block unions from sending e-mails to employees but then allow an employee to sell Girl Scout cookies.

The National Labor Relations Board has not made any definitive ruling yet on whether unions can demand employees’ e-mail addresses from employers, she added.

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