EMPLOYERS CAN MONITOR E-MAIL, BUT MUST BE CAREFUL

QUESTION: I have provided a computer and Internet access to each of my office employees. I have also told them that while it is alright for them to use the Internet for personal reasons during their breaks and lunches, they must stick to business while they are using it during work time. Yet I know that many of them routinely use the Internet for personal activities, regardless of what time of day it is.

Worse yet, one of my employees just told me that she has received sexually graphic e-mails from a co-worker. When I told the co-worker to stop this, he said that since he was sending the e-mails on his break and from his own account, there wasn't anything I could do about it, and that I had no right to be "reading his mail" in the first place.

I want my employees to feel that their privacy is respected, and I certainly don't want to develop a "Big Brother" reputation. But where do their rights end and mine begin?

ANSWER: This is a question being asked by employers throughout the country (and the world, for that matter). While most employees do not abuse Internet privileges, there have been cases where employees have spent hours a day on the Internet conducting personal activities or logging on to pornographic websites. This can obviously result in a lack of workplace production and efficiency. In addition, some courts have held that an employer can be liable for their employees sending harassing e-mails to co-workers, just as if those messages were expressed the "old fashioned" way. Liability can also ensue if the employee is displaying pornographic material on his or her website.

Therefore, courts have generally recognized that employers have a legitimate business interest in knowing what kinds of e-mails are sent from company computers. However, employees also have the right not to have employers unexpectedly and indiscriminately go through their private writings and materials.

Since the key words here are "unexpected" and "private," employers are well-advised to create policies informing their employees that the employer reserves the right to periodically monitor e-mails and other computer-generated materials. As with the other "privacy" issues we have been discussing in this series, the key is for employers to clearly set parameters and let their employees know that they should not have a "reasonable expectation of privacy" in these items.

Employers should also make clear that e-mails with obscene, discriminatory or other offensive content will not be tolerated, even if they are composed during an employee's break or lunch hour. If an employer implements such a policy, trains employees on it and has each employee sign a statement verifying that they have received and read it, the employee would have a difficult time claiming that his or her privacy rights were violated.

In addition, under the Federal Uniform Electronic Transmission Act of 1986, employers are allowed to electronically monitor e-mails as long as they inform employees that they are doing

this, and as long as they stop monitoring if they determine that the e-mail is personal in nature. Talk with your attorney for more information about this law.

Finally, both employers and employees should recognize that pressing the “delete” button does not get rid of that inappropriate or offensive e-mail. The e-mail still “lives” on the employer’s backup system, and can be recoverable for years. Rather than take any false comfort in the “closed” and “opened” envelope icons on your computer screen, it is far more practical to think of all e-mail as a postcard that is very much in the public domain.

For more information on this and other important issues affecting Oregon employers, please visit our website at www.oregon.gov/boli/ta. You can also call us at 971-673-0824.