

Update

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E-Mail and Privacy

Introduction

During the late 1980s and 1990s, the forces of technology have affected nearly every sector of the American workforce, including employees in higher education, whose dependence on the number one agent of technological advance — the computer — continues to increase. Few dispute the benefits of new workplace technologies, but as with most positive change, there is a cost. In the case of new electronic modes of communication (electronic-mail), the cost is the diminution of employee privacy.

Scope

Electronic mail is the exchange of messages between two or more persons via computer. E-mail systems can be self-contained and operated by the college or university, or they may be “global,” relying on the Internet to facilitate communication between distant locales. As is the case in the higher education setting, the proliferation of e-mail use in the workplace generally is dramatic. Nationwide, about 23 million employees used e-mail in 1994; 72 million are expected to use it by 2000, according to an Electronic Messaging Association

survey conducted in 1995. Employees sent approximately 263 billion messages in 1994 and, according to the Association, that number is expected to rise to 4.1 trillion messages by 2000.

While e-mail technology is not brand new, it has only been several years since attention was first focused on the important privacy issues associated with this increasingly common method of workplace communication. Not surprisingly, many employees are unaware that computer-based electronic communication is quite easy to monitor. Employee perceptions of privacy are distorted as a result of log-on identifications and passwords which give the false impression that only the employee can access his or her account. The number of employers routinely monitoring employee e-mail messages — often as a means of supervision — continues to grow. E-mail monitoring does not contemplate someone looking over an employee’s shoulder and reading what is on the computer screen. Instead, a computer network administrator actually taps into the computer account and is able to read or download both the messages sent and those received — all with-

out the employee knowing. A 1993 study by *MacWorld* magazine found that 22% of employers have engaged in searches of employee computer files, voice mail, electronic mail, or other network communications.

However, a 1994 report from the Department of Labor (*Privacy Provisions in Major Collective Bargaining Agreements, 1992*) noted that only 17 contracts covering 177,800 workers dealt with the issue of e-mail monitoring. The majority were in the telecommunications industry. None of the contracts covered higher education faculty or staff.

Employer Perspective

Before discussing the legal and collective bargaining implications related to e-mail privacy, it is helpful to understand the employer’s argument in support of monitoring. As an initial matter, employers typically believe that because they own the e-mail system and make it available to employees, they own all of the system’s messages and can read them with impunity. Employers contend that monitoring e-mail messages is necessary to investigate and prevent theft, fraud,

and other illegal conduct and accurately assess an employee's work performance.

Union Perspective

Employees and their union representatives, in response, argue that employees do not surrender their privacy rights at the office door. Moreover, electronic monitoring of any kind creates a stressful work environment, tends to negatively affect productivity, and quickly leads to morale problems. It is interesting to note that these arguments were validated by a University of Wisconsin/Communications Workers of America study published in 1990. The study found that in parts of the country where telephone companies monitored their operators, stress levels rose significantly, and in regions where monitoring was not utilized, employees had as high or higher performance ratings as monitored employees.

Legislative and Legal

Unfortunately, Congress has not appreciated the employee privacy issues associated with e-mail monitoring. A bill introduced by Senator Paul Simon (D-Ill.) in 1993 to restrict employer monitoring of e-mail has never come up for a vote. Similarly, legislation known as the "Privacy for Consumers and Workers Act" which was sponsored by Representative Pat Williams (D-Mont.) has not been voted on. To date, there is no federal statute which prohibits employers from monitoring employee e-mail messages, and there has been little activity in state legislatures to pro-

tect employee privacy as it relates to e-mail.

While an employee's e-mail privacy may not be protected by law, this does not mean that higher education bargaining units are precluded from negotiating sensible e-mail privacy policies with their respective administrations. Given that e-mail privacy concerns exist, it is far more sensible to participate in the creation of an e-mail privacy policy than to react to one imposed by the administration. While e-mail privacy policies have made their way into relatively few collective bargaining agreements in large part due to the newness of the issue, most policies, at a minimum, provide for resort to a grievance-arbitration procedure, especially in cases of employee discipline for e-mail related abuses.

Even if higher education bargaining units choose not to or are unable to negotiate e-mail privacy policies, the prognosis for protecting an employee disciplined for e-mail related offenses is generally encouraging. In two recent arbitration cases, arbitrators have sustained grievances from employees who had been disciplined for e-mail related offenses.

In *Conneaut School District*, 104 LA 909 (1995), arbitrator Ronald F. Talarico sustained a grievance filed by the Conneaut Education Association on behalf of a high school librarian with 16 years of service who was reprimanded for using a school district-owned computer system to send

e-mail messages critical of the district's new curriculum and instructional schedule to 37 fellow librarians in Northwest Philadelphia. The high school learned of the e-mail messages when another school principal contacted the offending librarian's principal.

The arbitrator disagreed with the Association's position that the e-mail message sent by the librarian was a request for help with respect to the new curriculum and instead found that the message was highly sarcastic and critical of the district's efforts to develop a new curriculum. The arbitrator decided the narrow issue of whether the librarian had a right to utilize a district-owned computer to access an e-mail system to express personal opinions and criticisms about the school district's proposed curriculum plan. The arbitrator ultimately sustained the grievance because the school district had not promulgated an e-mail policy. The arbitrator stated:

E-mail is one of the newest technological innovations that exists. The School District admits that it has no rules or regulations governing the use of its computer/E-Mail system. Moreover, this particular infraction cannot be characterized as a clear cut or blatant misuse of the E-Mail system. Rather, it was a situation where an appropriate utilization was intertwined with improper personal opinion and editorialization. I am, therefore, unable to conclude that the Grievant reasonably should have known that she

did not have the right to utilize the E-Mail system in the “quasi-personal” manner in which she did.

In another recent arbitration case, *AlliedSignal Engines*, 106 LA 614 (1996), Arbitrator Rhonda R. Rivera reinstated, without back pay, a 17-year employee who authored a regular underground newsletter disseminated, in part, via e-mail. The newsletter, called *Taboo Topics*, mocked the company’s own publication called *Table Topics*. While the company was non-union, it had created its own disciplinary policy and appeal procedure which the employee took advantage of after he was terminated for producing an issue of the newsletter which contained culturally insensitive material and for unauthorized use of the company’s e-mail system.

The arbitrator found that the employer had condoned publication of *Taboo Topics* for ten years and that the employee was lured into a false sense of security. The arbitrator also found that the company did not follow its own disciplinary procedure and terminated the employee without giving him an opportunity to address the charges against him.

With regard to the e-mail issues, the arbitrator found that the company did not have an e-mail policy but likened the company’s rule against excessive use of telephones to e-mail communications. The arbitrator found that the employee did not violate the rule ex-

pressly, but that the spirit of the rule was violated.

While *AlliedSignal Engines* is more an e-mail access/use case than it is a privacy case, the e-mail privacy issue has been recently litigated, albeit unsuccessfully, in a Pennsylvania federal court. In *Smyth v. Pillsbury*, 914 F. Supp. 97 (E.D. Pa 1996), the plaintiff, an at-will employee, sued his employer for wrongful termination when he was fired after the employer intercepted his e-mail messages to a supervisor. The plaintiff and his supervisor had exchanged e-mail messages during which the plaintiff referred to the company’s holiday party as the “Jim Jones Kool-Aid affair” and made threats to kill the sales management team. The plaintiff claimed that his right of privacy had been violated.

In the lawsuit, the plaintiff alleged that the company repeatedly assured its employees, including the plaintiff, that all e-mail communications would remain confidential and privileged and that e-mail messages would not be intercepted and used by the company against its employees as grounds for discipline.

The court found no applicable public policy exception to the Pennsylvania at-will employment doctrine which allows an employer to discharge an employee for any reason or for no reason at all. The court further held that once the plaintiff transmitted his unprofessional comments over the company’s e-mail system, he lost any reasonable expectation of privacy.

Finally, the court said that even if the plaintiff did have a reasonable expectation of privacy in his e-mail communications, no reasonable person could find the employer’s interception of them highly offensive. Indeed, the court found that the employer had a legitimate interest in preventing inappropriate and unprofessional comments over its e-mail system that outweighed any employee privacy interest.

Clearly, the *Smyth* decision, which was not appealed, does not bode well for at-will employees who have been terminated or otherwise harmed as a result of e-mail monitoring. The *Smyth* decision and its unfortunate result clearly illustrates the need for collective bargaining in the area of e-mail privacy. Higher education bargaining units should take the lead in drafting e-mail privacy language as employees will be better served if they are apprised of the do’s and don’t’s about e-mail.

Conclusion

Absent strong contract language or federal or state statutes which explicitly accord privacy protection to workplace e-mail communications, it is advisable for higher education bargaining unit members to consider e-mail communications public and not private. Assuming someone else will see what you write should cause members to think carefully before engaging in inflammatory, offensive, or even controversial e-mail communication.

Contract Notes

A search of NEA's Higher Education Contract Analysis System (HECAS) turned up no contracts specifically addressing the issue of e-mail privacy. There were contracts addressing use of e-mail for union communications:

"The Association shall be permitted reasonable use of E-mail, the College's bulletin board in the staff lounge, and faculty mailboxes for communicating with members of the bargaining unit." (Edison State Community College, OH)

"The Association shall have the right of access to areas in which employees work, the right to use institutional telephones (at no cost to the district), bulletin boards, mailboxes, electronic mail services, and institutional facilities provided that such use of access shall not interfere with nor interrupt normal District operations. . ." (Santa Barbara Community College, CA)

As e-mail becomes as prevalent as the telephone for union and employee communication, Association chapters should consider all the ramifications involved in that use. E-mail communications are not limited to information

from Association to member, but include those between members, between faculty and students, between colleagues in other institutions. Current e-mail clauses do not address privacy issues nor surveillance issues; they simply address issues of permission.

Association chapters need to address the e-mail privacy question. The ideal agreement would be that all employee communications were private. However, in recognition of the fact that the institution may have a need for information in order to effectively manage institutional activities, a clause that balances that need with an individual's need for privacy can be developed around the following principles: Unless the institution actively asserts a "reasonable cause" request to retrieve and monitor e-mail messages, an employee's e-mail should remain private. At the point that the institution asserts its need to know, an employee should be notified that his/her e-mail files are to be pulled up and read and why, and the employee should have the right to have an Association representative present as the documents are read and/or copied. The process should be subject to the grievance and arbitration procedure to protect the employee from unreasonable surveillance or monitoring.



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