Is there any Privacy in the Workplace?

We may occasionally take our right to privacy for granted but more often we lock doors, use passwords and rely on legislation to enforce our need for privacy. We realize we can never assume that we will have full privacy and we often take extra care to ensure our personal matters remain confidential. Our notion of a right to privacy is closely linked to the high value we place on personal freedom. “Don’t tread on me” was a mantra at our nation’s founding and this idea of personal freedom is closely linked to those other founding principles: Life, Liberty, and the Pursuit of Happiness. These ideals surrounding personal freedom are all linked and are indelibly imprinted on the American DNA. It is part of who we are. So whenever an issue of privacy arises in our personal lives or in the press, it catches our attention as few other issues can. Yet, there is no explicit right to privacy defined in our Constitution and it is not specifically guaranteed in the Bill of Rights. There are many laws in place preventing others from invading our privacy, but many disputes still arise over this issue.

On March 31, the New Jersey Supreme Court ruled on a privacy matter (Stengart v. Loving Care Agency). Three weeks later on April 19, the US Supreme Court heard arguments on a different privacy case (City of Ontario v. Quon). The Supreme Court has not yet ruled in the Quon case. As employers we should become aware of these cases and their implications for our businesses and our employees. Today, in the workplace, there is a patchwork of privacy laws and practices that fail to provide comprehensive protection to either individuals or institutions. Thus, we must educate ourselves.

In both of these cases, the individual employees felt their individual privacy rights were breached by their employers. Both situations involved the use of private email in the work setting. Other court rulings have upheld a company’s right to limit personal use of email and internet on company time and while using company resources. Thus, many companies have strict policies regarding this personal use of email while at work. Yet, most employees still feel they have a right to send personal emails and visit personal internet sites during working hours.

In the New Jersey Case, the Plaintiff sent emails on company computers during work hours but used her private Yahoo email account. The company, Loving Care Agency, had a formal policy on electronic communication that clearly stated the company retained permission to review all electronic material stored on the company’s computers. The company’s policy even declared emails and internet access were not to be considered private. The facts though were not straightforward. The company allowed occasional personal use without defining “occasional “. Loving Care was not specific whether they meant company or personal email accounts. The case was further complicated because the emails in question were directed to an attorney, thus raising issues of attorney/client privilege.

In this case, a unanimous New Jersey Supreme Court held that the Plaintiff could maintain an expectation of privacy in e-mails from and to her attorney using her company-issued laptop, where her e-mails had been transmitted using her personal, password-protected e-mail account. The Court ruled that the employer could not use the e-mails in question to defend against the employee's subsequent discrimination claims, even though they were sent via the company's server.

Christopher Hartmann, a Morristown NJ attorney at Wacks & Hartmann LLC, who specializes in Commercial Litigation and Employment Law, cited three factors that were decisive in the Court's ruling. First, the communications with the attorney invoked the attorney-client privilege. Second, the company's policy was ambiguous concerning personal use of the Internet and did not disclose that all communications would be accessible by the company. Third, the employee used her personal, password-protected e-mail account and did not store any information on company servers that was damaging to the company or otherwise unlawful.

So, what are the issues? They seem to center around beliefs and expectations which conflict between employers and employees:

1) When reasonable use of email and internet is allowed, reasonable presumptions of privacy are expected by the employees.
2) Many employees further believe that because their personal data is primarily stored elsewhere (Yahoo, Facebook, LinkedIn, and Twitter), any resulting transactions stored on company computers should remain private.
3) Most companies believe that having clear company policies forbidding some or all personal use of email and the internet allows them to discount any perceived right of privacy.

Christopher Hartmann further advises: “This is a rapidly evolving area of the law. Employers should never undertake a forensic examination of an employee's computer hard drive without the advice of counsel. Policies concerning use of company computers and storage of electronic documents should be reviewed often and enforced as uniformly as practicality will allow”.

What can employers do to protect the rights of the organization? The following points may be helpful:

1) Companies must have a clearly stated policy on the use of company email and internet access.
2) All managers should be instructed to enforce this policy in a consistent way.
3) Companies should review and block access to widely used internet sites used for non-business purposes.
4) Employees should be encouraged to access personal email accounts and internet from their smart phones on their own time.

What should employees be mindful of?

1) Realize that everything sent from work can ultimately be viewed by someone at work.
2) Think first when communicating electronically. Document with discretion.
3) Assume that documents will stay around forever.

Due to the timely and important nature of this issue, Christopher Hartmann will be speaking at The Presidents Forum meeting on May 19 on “Technology Pitfalls for Employers”. “This is a rapidly evolving area of the law”. As social media grows, employers will continue to restrict usage and employees will continue to challenge.

Steve McCarthy 4/27/10