FRIDAY • SEPTEMBER 17, 2010

THE DAILY REPORTER

COLUMBUS' ONLY DAILY BUSINESS AND LEGAL NEWSPAPER - ESTABLISHED 1896

Small Business Report: *Small Business Basics*

Employers need consistent guidelines for monitoring employees' behavior

DAILY REPORTER STAFF

When it comes to employee privacy, not everything is black and white. Technology — including cell phone text messaging, social media websites and online chatting — are causing some concern for employers and attorneys.

Jackie Ford, a partner at Vorys, Sater, Seymour and Pease LLP, said when it comes to employees' computer privacy, many courts would say employers have the upper-hand. Even without an explicit policy, employers generally are free to examine data on their employees' computers.

However, Ford said, some courts view computer privacy issues more conservatively, erring on the side of employee privacy. These decisions are sometimes based on the reasoning that nearly everyone ends up using the office computer for at least some minimal form of personal communication, she noted.

Beyond computers, everything in a workplace is considered fair game by some courts, said Ford.

In a recent case, *New York v. Klapper*, a judge threw out criminal charges against a small business owner who had secretly installed keystroke recognition software on office computers.

"The owner had collected data from the software that included the passwords for employees' personal e-mail accounts, then used those passwords to print off messages from those accounts and share them with others," Ford explained, adding that she believes if the employer had been prosecuted under federal law instead of state law, he might not have been so lucky in court.

"What's interesting about the case is the judge's statements to the effect that employees should have no expectation of any privacy whatsoever in anything they type on a workplace computer," she said.

The judge in *New York v. Klapper* wrote for the court: "The concept of Internet privacy is a fallacy upon which no one should rely. It is today's reality that a reasonable expectation of Internet privacy is lost, upon your affirmative keystroke."

"Typing, the judge seemed to say, is the online equivalent of stripping naked," Ford said, adding that a California judge faced with similar facts had a very different opinion.

In *Brahmana v. Lehman*, the U.S. District Court for the Northern District of California ruled that an employer could be committing an impermissible "interception" under the federal Electronic Communications Privacy Act by using key logging software to discover an employee's personal e-mail account password, and then using that password to access a personal e-mail account.

In a New Jersey case, *Stengert v. Loving Care*, an employer's review of a former employee's workplace computer uncovered e-mails sent from her personal e-mail account to her attorney. Although the company's policy stated that it could review "all matters on the company's media systems and services at any time," the Supreme Court of New Jersey found this language to be insufficient because it wasn't clear from the policy language whether the use of "personal, password-protected, Web-based e-mail accounts via company equipment" was covered.

In finding against the company, the court concluded that: "Employees do not have express notice that messages sent or received on a personal, Web-based e-mail account are subject to monitoring if company equipment is used to access the account."

"I would strongly encourage any employer to develop, and then educate its employees about, a specific policy on the company's right to access data stored on its computers," Ford said. "While it may be legal, in many cases, to access it even without a policy, being up front about it makes for far better employer/employee relationships."

In addition to employee privacy cases involving workplace equipment such as computers and cell phones, some employment cases have focused on after-work conduct.

Ford said some states, including New York, have laws prohibiting terminating employees for legal, off-duty conduct. However, even New York allows employers to take employment-related action if the off-duty conduct has a direct relationship with an employee's job duties, she said.

"The question the employer should be asking itself is: Why do I care about this conduct?" Ford said.

"If the employee is a manager, am I concerned that the off-duty conduct could undermine that person's ability to manage her staff? If the employee is an executive who represents our company to the public, is the off-duty conduct undermining the executive's ability to do those things? If the conduct concerns the employee's spouse, but does not involve the employee directly, why do we, the employer, even think we may want to get involved?"

Brendan Feheley, an associate at Kegler Brown Hill & Ritter, said most often, courts side with employers when they terminate, suspend or demote an employee based on off-duty conduct, since employees should realize from the start of a job that their actions are subject to their employment.

"I haven't seen a whole bunch of litigated cases because the law is relatively clear in the sense that employers are free to take whatever they want into consideration, including outside of the office, as long as they treat everybody the same," Feheley said, adding that employers do sometimes face public-relations backlash when they do act on off-duty conduct, and others think their actions were unfair.

In 2009, the Philadelphia Eagles fired a stadium operations employee for a post on his Facebook account regarding his disappointment with the team letting a player sign with the Denver Broncos. Afterward, the public became very upset about the termination, and the team endured a "public relations nightmare," Feheley said.

"I think it's a common misconception for employees that somehow their freedom of speech extends to their private workplace, and it just doesn't ... but the public thought, 'How come he doesn't have the right to say what he wants to say?'"

Ford said early in the 20th century, Ford Motor Company had a "sociological department" with 100 investigators who frequently monitored employees in their homes to make sure they did not drink too much, led "unblemished" sex lives, cleaned their homes well and properly spent leisure time.

"A hundred years later, many employers are still taking job actions against employees because they find the employees' off-the-job behavior has an impact on some aspect of their jobs," said Ford.

"Today, employers can choose, in some cases, to ignore many types of legal off-duty conduct, but there are other types of off-duty conduct that the employer really cannot, or should not, choose to ignore.

"For example, if a manager makes racist comments about his subordinates, the employer needs to take action even if those comments are made off-duty. It's a free country, but statements like that can be imputed to the employer, regardless of where they're made."

Feheley agreed, and said although most employers don't like to get involved with their employees' public lives, they can be negatively impacted by several types of employee conduct.

If an employer's work involves allowing employees to drive vehicles, they have to be concerned about employees' driving conduct and attitude with other drivers outside of the workplace, he explained. Employers should be honest with employees from the beginning of employment about what they have the ability to do, and what will happen if they participate in certain activities. The employer must remain consistent in handling similar situations the same way among all employees, he added.

Ford said employers should have clear, solid policies in order to prevent any employee-spurred litigation due to an employer's actions. They also should memorialize, or document, why the information was relevant, how it was determined to be authentic, and why certain steps were taken.