

BLOGS, WIKIS AND IM - HOW SHOULD EMPLOYERS RESPOND?

New forms of communication technology are increasingly being used by workers for business purposes, and also for personal use while at work. Employers need to consider how to use such technology to their advantage while minimizing legal risk and potential reduced productivity. This edition of the Employment Law Advisor discusses the mainstreaming of these technologies, the risks inherent in their use, and the steps employers can take to reduce these risks.

THE "BLOGOSPHERE"

In summary, a "blog" (the short name for "Web log") is an online journal which, in many cases, is open to reader comment and direct dialogue. Blogs are fast becoming commonplace. Indeed, by some reports, 32 million Americans (more than a quarter of United States Internet users) read blogs. There are now more than *60 million* blogs worldwide. Corporate America has not overlooked the emergence of the blog - major corporations such as Microsoft, IBM and GM are publishing corporate blogs. As has been well-publicized, corporate employees are publishing their own blogs - sometimes to their employers' ire. For example, Delta Airlines fired a flight attendant when she posted photos on her blog that showed her posing suggestively in her uniform on board a Delta jet. The attendant has now filed claims that her termination amounted to discrimination based on gender.

"Wikis", although less well known than blogs, are becoming a growing phenomenon. Probably the best known wiki is "wikipedia" (www.wikipedia.org), the massive online encyclopedia. In summary, a wiki is an online collaborative tool that allows contributors to post and actually change content. Wikis are being used in many corporate settings, both externally and internally. As an example, Microsoft uses wikis to gather customer input and ideas on its products. According to BusinessWeek, other companies are using wikis internally to chronicle brainstorming efforts, track projects, edit documentation, and coordinate marketing. These companies report that such collaborative tools have eliminated countless meetings, conference calls and emails.

"IM," short for Instant Messaging, has similarly become a popular workplace tool for communication. IM is a form of written communication over the Internet that allows for realtime conversation, similar to a chat room. Recent statistics indicate that about 25 million workers use IM in the workplace. However, much of the IM traffic is not work-related. According to a recent survey, over 60 percent of IM'ers use IM to correspond with friends and family while at work.

INCREASED REWARD, BUT INCREASED RISK

The rapid emergence of these new technologies in corporate America shows that many businesses view them as a means for achieving a competitive advantage and increasing worker productivity. Corporate blogs are being used as a method of low cost global communication - helping businesses raise their profile, introduce new products, and assist in branding. Some corporate blogs even contain substantive discussion of business strategy. IM and wikis are reshaping corporate communications and, when used appropriately, increasing productivity.

However, the use of these technologies is not without disadvantages and risk. One obvious problem is that some employees can spend far too much time blogging, IMing with friends, or simply web-surfing - with a corresponding decrease in productivity. Moreover, the informal and instantaneous nature of these types of communication can result in the posting of statements and observations that may not be carefully thought out. Such informal statements posted to a corporate blog or wiki, insider blog, or in some instances an employee's personal blog, may expose the company to a variety of legal problems. The following identifies some legal issues that may arise from the ill-considered use of blogs, wikis and IM:

- *Employment discrimination/harassment.* Inappropriate statements made by employees on official or quasi official blogs, as well as in wikis and IM, in many cases may be preserved and can become prime evidence in discrimination or harassment claims.
- *Trade secrets.* Disclosure of company trade secrets is more likely in the informal world of the "blogosphere." Even if inadvertent, such disclosure may result in the loss of trade secret protection of the disclosed information.
- *SEC violations.* For publicly held companies, external disclosures contained in blogs, wikis and IM present a variety of risks, including securities fraud for material misstatements, violation of selective disclosure rules for the dissemination of material nonpublic information, and loss of safe harbor protection for forward looking statements.
- *Defamation and Privacy.* Employee posts to a corporate blog or wiki may expose an employer to liability for statements that defame a third person, or impinge on a third person's privacy rights. Similarly, disparaging remarks about a competitor or its products or services may expose a business to a claim of trade libel.

- *Intellectual property issues.* Use of copyrighted or trademarked material may expose the company to intellectual property infringement claims.
- *Wrongful termination claims.* Employees fired for personal blog content may file claims for wrongful termination based on a variety of theories.

EMPLOYEE CLAIMS

With the increased use of blogs and other electronic communications by workers, both at work and personally, it is only inevitable that there will be employee litigation over terminations relating to such communications. Such claims may arise from the common misperception that the contents of a personal blog or other communications, no matter how negative towards their employer, are protected "free speech" under the First Amendment. However, the Bill of Rights' protection of free speech only protects citizens from governmental action - not action by employers. Nevertheless, because employees may still file claims based on this mistaken premise, an employer policy on blog/wiki/IM content may be a useful tool in educating employees of the risks they may run when discussing their employers in these new mediums.

Moreover, an employee terminated for blog or other content may still have claims, despite the lack of First Amendment protection. Although most employees are employed "at-will" (*i.e.*, the employee or employer may end the employment relationship at any time with or without cause or notice), an employee terminated for public electronic communications could assert claims for a variety of reasons. Such claims could include: (i) discrimination (treating an employee in one protected category less favorably than another employee in a different protected category for similar behavior - similar to claims filed by the terminated Delta flight attendant); (ii) termination in violation of public policy (an employee could assert that the blogging at issue was protected by state public policy - for example, a political blog); (iii) retaliation for engaging in protected activity (for example, an employee blog that suggested that the employer engaged in discriminatory practices could be considered "oppositional" activity protected by anti-discrimination statutes); or (iv) invasion of privacy for employer monitoring of postings the employee believed was private.

PRACTICAL ADVICE

Employers that take advantage of these new methods for communication should also take proactive steps to help minimize the risks they present. Although employers need to tread carefully so as not to stifle the advantages of these types of communications, some suggestions include:

- Conducting employee training on the risks of these technologies.
- Developing and publicizing a written policy that establishes clear guidelines on appropriate and inappropriate use of a corporate blog, wiki or IM.
- Developing and publicizing a written policy that establishes clear guidelines for what employees may say about the employer in a personal blog.
- Prohibiting personal blogging at work.
- Implementing software that allows corporate IT departments to monitor, filter, flag, block and/or save employees' IM conversations. Note, however, that although software exists which permits the contemporaneous monitoring of IM, such monitoring may run afoul of the Federal Wiretap Act which prohibits "interception" of electronic communications in "real-time," *i.e.*, monitoring of communications at the time of transmission.
- Developing and implementing employer policies that inform employees of potential employer monitoring and review of blogs, wikis and IM to help minimize the risk of invasion of privacy claims.
- Monitoring of employee use of blogs (in particular, a corporate blog), wikis and IM.
- Deleting improper content.
- Using appropriate disclaimers to seek to limit employer liability for statements on blogs, wikis and IM.
- Establishing archiving and retrieval systems of blog, wiki and, potentially, IM content.

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