Workplace Investigations, Electronic Gadgets and Disability

Legal Issues and the Role of HR

by David Madison

Claudia M. Cohen, partner at Epstein Becker & Green, told the audience how to protect company privacy when employees may have camera phones and use Blackberries and instant messaging.

The following article is based on a panel presentation at the July 8, 2005 meeting of the HR Network at the American Management Association headquarters in Manhattan. The HR Network is co-sponsored by the Five O'Clock Club and the AMA and is a venue for HR professionals to meet informally and hear discussions of important topics of the day. Beth Ranney, Sponsorship/Partnership Director for AMA, served as our host and moderator.

The panelists on July 8 were:

- Claudia M. Cohen, Epstein Becker & Green, who addressed the issue of monitoring electronic communications, which--with the popularity of blogs and camera phones--have become increasingly invasive.
- Roxane Marenberg, DLA Piper Rudnick Gray Carey, who spoke on making internal investigations bullet-proof to thwart claims and litigation.
- Dennis A. Lalli, Kauff McClain & McGuire, who covered the differences between New York State and federal disability laws.

When you were thinking about human resources as a career, whether that was two or twenty years ago, you probably didn't consider that one of your primary concerns as an HR professional would be *working with lawyers*—and configuring policy so that working with lawyers could be kept to a minimum! In today's world it doesn't take much to get lawyers involved. The department manager who asks a woman during an interview, "Do you plan to become pregnant anytime soon?," has broken the law on several levels, and, of course, this is a human resources issue. The workplace is, in fact, impacted by a huge body of employment laws, and one of the primary responsibilities of HR is to be aware and keep current on this front.

Keeping a Few Steps Ahead of 007 in the Workplace

You don't have to be a fan of spy thrillers to know that, these days, there are many different ways to snoop—and to spread images, information, trade secrets, as well as gossip, rumors and gripes. A recently as ten years ago, most companies didn't have policies on the use of email and the Internet at work; although, clearly, that has changed; in many cases, policy has not kept pace the rapid changes in *how people communicate*. And companies can find themselves vulnerable if they don't keep pace. In other words, constant review of policy is in order, and if you haven't done it *recently*, don't put if off.

What should company policy be about posting rumors or grips on blogs?

Obviously, the workplace is for getting business done, and long before the revolution in communications, companies had policies about personal phone calls—usually something along the lines of keep them to a minimum. But now most ways of communicating leave trails and records *about content*, and employers usually do want to make sure personal communications done from work are appropriate. Accessing porn sites at work or indulging in intimate talk via email come to mind; obviously, these shouldn't be done on company time, but that's only part of the problem.

Over 320 HR professionals sent in reservations. These are some of the lucky 120 who got in.

Such stuff can remain on company computer systems forever. Employees might well argue that some private business has to be done from work—hence phone calls have always been allowed. Some websites visits or email exchanges relate to private medical or personal problems, and thus aren't the boss' business. So why shouldn't there be a right to privacy?

Clearly most employers have no interest in infringing on or inhibiting necessary private communications, but the need to protect the organization remains. This has generally been done by letting people know that the company does retain the right to review all communications that leave trails. Letting people know can include making it clear in employee manuals, requiring employees to sign a statement that they are aware of the policy and having them agree to it. To be emphatic about the policy, notification can appear on the screen every time people log onto the Internet and email. Courts are more likely to side with the company if it can be shown that the policy is clear and well publicized.

The Too-Candid Camera

But now that we're half-way through this first decade of the new century, we find a need to address more than email and the Internet. What about cellphones with cameras, blogs and instant messaging? The camera has never really been an issue at most workplaces—who even bothered to bring a camera to work, except for special occasions? But soon *everyone* will have a camera at work whether they want to or not; *by 2006, 80 percent of all cell phones imported to the U.S. will be camera phones.* This could be a handy tool in some business settings, *e.g.*, for insurance adjusters on the scene of an accident or for real estate appraisers at a property site. Taking a snapshot of a list drawn up at a meeting can also be helpful. But Samsung, which designs cell phones, has banned them at work precisely because they can be used to take snapshots of lists and a lot more—in the research and development department, for example.

Of course, there is also the invasion of privacy factor, which might matter most to people on the job. They don't want to worry about being photographed in the restroom or in any setting without their knowledge—with the fear that the image could be used maliciously. Hence, if you've not made sure that there's a *written policy* on camera phones at the office—probably banning their use except for business purposes—you're putting your company at risk. That is, business itself may be compromised (corporate spying), and harassment suits are just waiting to happen when an employee discovers that a candid photo has made its way onto the Internet. There are a lot of rules and regulations to *protect* people on the job, and strict protocols on camera phones are appropriate.

Instant Messaging Can Actually Be Forever

Anyone with any sense at all knows enough not to badmouth the boss or company in an office email, not to use four-letter words or type in links to obscene or inflammatory websites—for the obvious reason that it might all be monitored, and these all may remain in the archive even if you hit delete. Indeed, there may be no such thing as delete in many systems because companies know that destroying emails can be treated by the courts as the equivalent of shredding. Even so, people tend to forget the enduring nature of email, and say things they shouldn't. Consider then, the greater dangers posed by instant messaging (which is usually done with more speed and less care than regular email), accessing home email from work, and posting gripes on blogs. The ability of employees to communicate rapidly and across the globe seems to be increasing exponentially, and companies should be sure that they're keeping up to protect themselves and their workers.

For example, what should company policy be about employees posting rumors, gripes or even confidential information on blogs—even if they don't do it on company time? If the company doesn't want this to happen, then the policy has to be in writing, so that people can't say they didn't know. The wording can be as simple as: "Posting confidential information or trade secrets, as well as statements that may disparage or reflect negatively on the company on the Internet, via blogs or email communications is forbidden." A Delta Airlines flight attendant used a web blog to describe her adventures in the cities where she had layovers; the company considered it bad publicity and fired her. Delta got away with the dismissal, but because it did not have a written policy against blogging, the state department of labor awarded her unemployment compensation.

When a Complaint Has Been Lodged: the Necessary Investigations

While almost no complaint made in good faith should be minimized or trivialized, one of the oldest aphorisms in business may wisely be invoked here, namely the KISS principle: Keep it simple, stupid. There well may be detailed protocols in place for dealing with violations and infractions, but rather than launching a full-blown investigation in some cases, HR can save a lot of time and energy by considering: "Can this be addressed and resolved *on the spot*?"

For example, let's consider the case of a department manager who has left

Roxane Marenberg, of DLA Piper Rudnick, told the audience how to conduct internal investigations and avoid litigation.

Beth Ranney, our AMA host, kept things going during the Q&A.

one of the well-known centerfold magazines in full view on the credenza in his office. Any number of his colleagues, male or female, may consider the magazine offensive—and it's hardly possible to avoid several visits to the manager's office every day. Of course, the presence of such materials in the workplace might be contrary to *published* company policy. If a colleague has reported the presence of the magazine to HR, does this call for a full formal investigation? Instead, such an incident probably requires the application of a little common sense, and the savvy that comes with experience. Is the incident a matter of lack of communication between a couple of employees? Is there simply a misunderstanding of company policy? Will you need help from other departments to get things worked out?

Rather than switching on the gears of the bureaucracy, the HR officer might instead just walk down the hall and ask the manager to remove the magazine—then do follow-up checks to make sure that the manager has complied. An email to supervisors and managers is probably also a good idea, pointing out company policy—and the general rules of propriety for any workplace. Solving the problem on-the-spot without a formal investigation will save everyone grief, stress and distraction from doing their jobs.

Getting Ready for the Difficult Cases

On-the-spot resolutions, however, won't work all of the time or even most of the time, because problems or infractions may be *more systemic* than an occasional magazine left on the credenza.

What if several of the managers leave such magazines lying about—and don't see the problem? What if employees are visiting porn websites on the company computers? Perhaps more than one manager likes to ask female job applicants if they plan to become pregnant.

Obviously, the purpose of any investigation is to bring about change, but any investigation should be carried out in such a way that it be bulletproof, with the goal that the results stand up in court. There are several elements that need to be brought together to construct a solid investigation:

- Enlist experts to help, *i.e.*, the people with specialized knowledge. Investigations can range far beyond the issues mentioned above, so the expertise of those in risk management, security, IT, auditing and accounting may be necessary. Your knowledge of HR may be extensive, but, chances are, the investigation will need to rely on those who have a much deeper understanding of other disciplines and other sources of information.
- Gather all of the relevant employee's personal files, which should include information about past patterns and conduct. You need to know if an employee has a history of complaints or transgressions. For example, has an employee who has filed a complaint been given an adverse evaluation by a supervisor who is being accused of a misdeed? Does the file include all of the necessary documents, such as the employment agreement—listing the company dos and don'ts—that the employee signed when hired?
- If you're trying to establish that regulations have indeed been violated, you will need to have all the regulations at your fingertips. That is, collect and study all of the documentation that your company has amassed to specify what is allowed and what is not allowed, *i.e.*, the audit manuals, employee handbooks, and policy and procedure statements.
- Make sure you have sufficient information about context and circumstances—so that you're not looking at the complaint in isolation. Have there been rumors about the kind of behavior that has drawn a formal complaint? You may need to check out rumors that have circulated and have been ignored.
- Collect the *company property* that relates to the issue under investigation, and here company property means the *archives of communications*. You want to see the emails that have passed between or among the parties involved, and memos that have been sent. The record of the Internet usage will probably be relevant as well.

Anticipate Outcomes and Reprimands

What's going to happen if you find out that an employee has broken the rules? It's not advisable to go into the process with only a vague idea of what the consequences could be. Employee violations can be mundane or carry major implications for a company and its bottom line—but HR and the legal team should know ahead of time what actions will be taken if a violation is verified—whether the consequence is merely a slap on the wrist or a termination. Usually there's a wide range of options short of termination:

- An official reprimand, along with a letter of reprimand for the employee's file, to make sure there's documentation

Richard Bayer, far left, the Five O'Clock Club's Chief Operating Officer, poses with some of our administrators who keep the breakfast seminars running smoothly. From left, Shanoza Shamir, Nydia Reid, Nicole Williams, Alexandra Nmashie and Terry Setzer.

for future reference—when, perhaps, the current HR officer and manager may no longer be with the company. That is, it's not good for proven incidents of harassment to be forgotten when the cast of characters changes.

- Taking away a bonus or a merit-based raise.
- De-equitizing a partner.
- Requiring remedial training, e.g., sensitivity or diversity training, and requiring the employee to pay for it.

In other words, punishments should be well thought out and consistent. In the long run, precedents can be used to guide policy, so that remedies do not appear inappropriate or arbitrary, and any company can say, "This is the way we do things here." Needless to say, if an HR officer is too close to the employees involved, a third party should be asked to handle the investigation and its consequences.

Always a Hot Legal Issue—and a Headache: Disability Definitions and Accommodations

As we all know, there are many layers of laws in the United States, the most obvious being federal, state and city, and disability regulations and requirements have been created at all of these levels—as well as in all fifty states and hundreds of cities. This truth alone gives us a glimpse into the complexities of sorting out what is right, fair and

Dennis Lalli, Kauff McClain and McGuire, told us major differences between New York and Federal Law on disability discrimination.

compassionate in the workplace for disabled employees.

Kate Wendleton enjoys her role of moderating the panel.

For starters, there are different legal definitions of disability. According to the federal Americans with Disabilities Act, disability means: *A physical or mental impairment that substantially alters a major life activity.* Although this sounds straightforward enough, it can keep lawyers busy for months and tax the wisdom of HR professionals; in the context of a person's ability to do his or her job there may be considerable disagreement on how to define "substantially" and "major life activity." The issue is complicated further if state law has a different definition. In New York State, for example, disability is defined as: *A physical, medical or mental impairment that is demonstrable by medically accepted clinical or laboratory diagnostic techniques.* The words "substantial" and "major" are missing here—which may mean that a condition is a disability if a doctor can diagnose it!

While the federal law thus has the tighter definition, it also requires employers to engage in an interactive process with a disabled employee in order to determine what workplace accommodations are reasonable and can be provided. The federal law also probably favors the employer because, in some cases, it requires minimal job restructuring and environmental alterations.

HR professionals are advised to gain a mastery of these issues because, they, above all, are supposed to be protective of human values in the workplace. And all of us, to one degree or another, strive to be compassionate people—which should mean doing our best to accommodate to those who are disabled so that they can have the dignity that comes with earning a wage. A few decades ago the prevailing attitude was probably, if you can't do the job, you're out. A lot of human potential went unrealized. ●

Contact information for the panelists.

All of the panelists are employment *generalists.* However, they each prepared extensive handouts on a specific, narrow topic. If you are an HR Executive who was unable to attend the meeting and **would like to receive the handout**, or if you need help in any employment area, feel free to contact these speaker. All speakers provided extensive handouts.

Ms. Claudia M. Cohen
Partner, Epstein Becker & Green, P.C.
250 Park Avenue
New York, New York 10177-1211
(212) 351-4838
ccohen@ebglaw.com

Spoke on Electronic Communications Policies – How can you monitor electronic communications? Employees may have camera phones and use blackberries and instant messaging. Do you have a policy on that? Courts require companies to keep their emails. Are you in compliance?

Mr. Dennis A. Lalli
Kauff McClain & McGuire LLP
950 Third Avenue, 14th Fl.
New York, New York 10022
(917) 921-2017 (cell)

Spoke on Disability Discrimination — There are major differences between New York and Federal Law, and a clear understanding can help you reduce FMLA and other claims.

Ms. Roxanne Marenberg
Partner, DLA Piper Rudnick Gray Carey
1200 19th Street
Washington, DC 20036
202-861-3419
roxane.marenberg@dlapiper.com

Spoke on Conducting Internal Investigations – How to make internal investigations bullet-proof to thwart claims and litigation. Roxane will provide a ½-inch handbook covering every situation you may face and how to handle it.

Ms. Beth Ranney
Sponsorship/ Partnership Director
American Management Association
1601 Broadway
New York, NY 10019
212-903-8165
branney@amanet.org

Hosted the event. Management and other training programs, as well as space rental.