

**“You should never put anything in a company e-mail that you don’t want to be shown to 12 strangers on a big movie screen.”**

Is an employer liable for an employee's electronic communications?  
The short answer: YES.

As an employer you can be held liable for all communication you knew about, or SHOULD HAVE KNOWN about.

With the technology available to employers today, that standard is high.

What's an employer to do? Two recommendations:

1. Fight technology with technology: There are several technological measures that employers can take to mitigate employee abuse of network systems. First, an employer can install software that will allow it to check all e-mails and Internet sites visited for inappropriate words or phrases. Employees who know that their employer has installed this type of software will be deterred from visiting problematic sites and from sending and receiving off-color e-mails. Second, and more effective, an employer can use filtering software for Internet sites or a firewall for e-mails. These devices stop the problem in its tracks: They block employee access to pornographic web sites and can prohibit the exchange of vulgar e-mails.
2. Adopt a clear e-policy: Although the Electronic Communications Protection Act is murky, its "prior consent" provision is clear: With notice, employees can waive their privacy rights through consent to an employer policy. A policy against inappropriate e-mail, voice mail and Internet use that informs employees they have no privacy rights in their use of these systems not only will deter abuses, it will likely defeat any invasion-of-privacy claims an employee might have under the ECPA. To ensure that employees actually waive their privacy rights, however, the policy should:
  - State that the employer owns the computer, phone hardware and network system.
  - Tell employees that they have no privacy rights in their use of the computer and phone systems and that all communications on them are company property.
  - Warn employees that having a password to their computer or phone does not mean that the employer cannot access their personal mailboxes.
  - Inform them that the company reserves the right to review e-mails, voice mail or Internet use. A way to do this, at least with regard to computer usage, is to install pop-up messages that appear when employees open e-mail programs or browsers. They

must click "OK" to access the programs, manifesting their consent to the possibility of employer inspection with each use.

- Explain that just because an e-mail or voice message is deleted does not mean that it cannot be recovered and reviewed.
- Notify employees of appropriate and inappropriate usage of company computer and phone systems. Instruct them that company policy prohibits obscene e-mail or voice messages, including racial, sexual or otherwise explicit materials, slurs or harassing comments.
- Finally, and perhaps most important, ensure that they sign an acknowledgment indicating that they have read, reviewed and understand the e-policy.

By adopting a clear e-policy, employers can deter co-worker harassment. By enforcing their e-policies, employers can take an important step towards insulating themselves from liability.

However, even with all of this in place, it is very difficult to account for the Human Factor.

Since 2006 and the issuance of new Federal Rules for Electronic Discovery (and even before then) court dockets have been littered with cases decided by "smoking gun" e-mails.

If you have not been through it before, e-discovery can be very invasive and produce surprising results.

There's a whole industry that's grown up to conduct these investigations.  
What are these cyber-sleuths looking for?

“Delete this email immediately.”

“I really shouldn't put this in writing.”

“We're going to do this differently than normal.”

“I don't want to discuss this in e-mail. Please give me a call.”

“Don't ask. You don't want to know.”

If you find yourself typing one of these phrases, perhaps you should delete the entire e-mail.

Also, watch out for “E-mail Rage” – the immediate nature of electronic communication can come back to bite you.

Many an e-mail or text message has been composed and sent when a person was in an angry or upset state (referred to as “flaming”). Many people have lived to regret these indiscretions in the cold sober light of the next hour, or the next day. Remember, whenever the Send button has been clicked, your e-mail is gone.

Tip: When you compose an e-mail while in an “upset state”, it is always a good idea to save it as

a draft for an hour or two and then read it over carefully at least once before sending it, just to make sure you are communicating what you really want to, in a clear and respectful way.

Consider also possible generational issues which affect employee attitudes toward electronic communication. Training may be in order to appreciate the effects of e-communication in a business context.

Actual Examples:

“I don’t want to hear any more about it.”

Personalized the issue and comes off as unreasonable.

“Get started.”

Lacks specificity.

“If you get it done, we will get you paid.”

Forms a contract.