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## Legal points on policies

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Sunday, September 03, 2006 - By Colleen Cleary

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Can an employer's email and internet usage policy protect a firm against employees' illegal activity?

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An employer may be held vicariously liable for the actions of its employees if those actions are committed in the course of an employee's work, unless reasonable steps are taken to prevent or reverse the effects of the employees' actions.

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Having a specific policy relating to e-mail and internet usage may be seen to be taking a reasonable step. However, the policy must be a working policy that is used and readily available to all employees.

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There are two examples that come to mind where an employer may be held vicariously liable for employees' actions.

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### 1. Bullying and harassment

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Employers are obliged to provide a safe place of work and a workplace that is free from discrimination. This obligation extends beyond the mere physical surroundings of the workplace and includes the provision of a workplace free from hostility.

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Harassment is any form of unwanted conduct that relates to the nine grounds as set out in the Employment Equality Acts 1998-2004 (gender, marital status, family status, sexual orientation, religion, age, disability, race or membership of the Traveller community).

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Should an employee use email or internet facilities to view or circulate inappropriate material that could be seen to have as its purpose or effect of harassing other members of staff, an employer could be found to be vicariously liable for these actions.

This is the case even if an employee did not intend to offend a fellow employee; if the effect of the material circulated or viewed was to cause offence, it may be deemed to be harassment, for which an employer could be held liable.

### 2. Child pornography

Under the Child Trafficking and Pornography Act 1998, it is an offence to 'knowingly' produce, distribute, print or publish any child pornography.

If an employee is misusing internet or e-mail facilities to access child pornography or to disseminate such pornography, there is a view that an employer may be held liable if an employer is aware of the misuse and fails to take remedial action and/or inform the Garda of such activity. Any delay could be seen as facilitating the committal of a crime.

In both examples, it would be critical to have an e-mail and internet usage policy that is used and enforced. This policy should set out guidelines as to what is acceptable in relation to e-mail and internet usage.

The policy must confirm that employees are being monitored, as in the absence of such provision it may be difficult to seek to rely on evidence gathered during such monitoring.

It is critical that the internet and e-mail usage policy provide that the misuse of the policy

can lead to disciplinary action up to and including dismissal.

In the absence of such provision, it has been found that, as an employee was not aware that his behaviour could lead to dismissal, when he was dismissed, it was not legal.

This happened in the Colum O'Leary v Eagle Star Life and Pensions (2002), case where a group of employees within Eagle Star called themselves the 'Legends' and were dismissed for circulating emails that contained defamatory material about other employees.

The Employment Appeals Tribunal (EAT) found that there was no evidence that the e-mails' contents justified dismissal and secondly, as the company's procedure had not defined misuse of e-mail as 'gross misconduct', it was found that the claimants conduct did not warrant dismissal.

An employee must be aware in advance of the consequence of breaching the policy.

It is also important that the e-mail and internet usage policy dovetails with the disciplinary policy and a bullying and harassment policy.

What guidelines should an e-mail and internet usage policy contain?

Every policy is different, depending on what level of control the company wants to exercise.

Ideally, a policy should set out guidelines as to what usage is acceptable (such as limited personal use) and it should also set out guidelines as to what is prohibited (such as abusive and defamatory emails, download of offensive or pornographic material or circulation of such material).

A policy should state that an employee's e-mails and internet use is being monitored and that a singular breach of the policy or consistent breaches of the policy can lead to disciplinary action up to and including dismissal.

However, companies should be aware that there is little point in having an e-mail and internet usage policy if it is not a working document that is used within the company. The policy must be issued to employees when they commence with a company, and ideally an employee should sign their acceptance to it.

The policy should be highlighted as an important part of the contract. Annual sign-off of a policy is good evidence of the employee's acceptance of it, either electronically or by hand-written signature.

The policy must be easily accessible to the employees in either hard or soft copy. Recently, companies have had their e-mail and internet usage policy appear on the opening page of the employee's screen daily and the employee must click their acceptance to it.

Alternatively, the internet and e-mail usage policy could be regularly e-mailed to all staff who would be required to click their acceptance to it. In any event, it should be regularly referred to and used.

In summary, the key things to highlight are that it is essential for employers:

to have an internet and email usage policy in place

to ensure employees are aware of any e-mail or internet monitoring

to make employees aware that a breach of the internet and e-mail usage policy can lead to disciplinary action up to and including dismissal, and

to ensure this policy dovetails with the disciplinary and grievance policy and the bullying and harassment policy.

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