THERE IS NO LONGER any room for doubt: the “wired” workplace has been a huge boon to business efficiency and productivity. However, employers must face another reality: employees use the resources of the wired workplace for non-business purposes. Much—possibly most—of this personal use is for relatively innocuous things like online banking or sending and receiving a few personal emails during the day. But some of the non-business

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use can put the employer at a competitive disadvantage, jeopardize its proprietary information and intellectual property, and expose it liability for workplace discrimination actions. In fact, with at least 70 percent of all access to pornography sites taking place during traditional work hours, it is clear that there will always be some employees in some workplaces who will misuse email and Internet access.


There are actions that employers can and should take to avoid liability in this area. Our clients must be made aware that the law in this area is developing in such a way that liability for an employee’s improper use of the Internet can be imposed upon employers in many instances. In fact, in some circumstances, courts will presume that employers have the ability to take certain measures to minimize liability, and will hold them responsible for failing to do so. Because the law and the technology in this area are subject to dynamic changes in short periods of time, the immediate implementation of safeguarding mechanisms will help to keep clients ahead of the curve. Moreover, as a matter of practice, creating a sound Internet and email policy will help clients limit the reduced productivity of a workforce distracted by excessive non-business Internet and email usage.

THE IMPORTANCE OF WORKPLACE MONITORING • Several reasons counsel in favor of employers implementing Internet and email monitoring programs, both as a means of managing their Internet and email equipped workplaces, and as protection from various liabilities arising from employee Internet and email use.

Basis Of Potential Liability: Respondeat Superior
The key to understanding the importance of monitoring in the wired workplace comes from understanding the legal underpinnings of the liabilities courts have imposed upon employers for the Internet or email conduct of employees: the doctrine of respondeat superior, and the concept of “chattels.” Pursuant to the doctrine of respondeat superior, a duty to exercise reasonable care in the control of employee actions has been imposed upon employers. Restatement (Second) Of Torts §317 (1965). This duty can extend to employee conduct outside the scope of employment, and hold an employer responsible to prevent its employee from intentionally harming others, or from conducting him or herself in a manner creating an unreasonable risk of bodily harm to others. The doctrine of respondeat superior applies under the following circumstances:

• When the employee is on the employer’s premises, or on premises that he or she only has access to because of his or her employee status; or
• When the employee uses the chattel, or property, of the employer and the employer knows or has reason to know of its ability to control the employee and knows or should know of the necessity and opportunity to assert that control.

Id. Perhaps the best way to foster an understanding of the imposition of duties under the respondeat superior doctrine is to use concrete examples of its application, several of which may even be familiar to the client.

The Duty To Remedy Harassment
Clients and attorneys should be quite familiar with this duty as they structure their work environments to avoid potential sexual, racial, and religious harassment claims. These days, most employers know that Internet and email access can give a misbehaving employee an amazingly efficient mode of harassment. What some employers don’t realize is that they can be held liable for failing to remedy harassment suffered by employees who were the recipients
of inappropriate downloads or emails from other co-workers. The respondeat superior doctrine supports this result, because the employee who shares the inappropriate communications with his or her co-workers is presumably doing so on company time, in the office, on a company-provided computer, and on a company-provided network. Moreover, the doctrine of respondeat superior has been interpreted broadly enough to support employer liability for the improper use of company property by an employee’s intentional or negligent exposure of co-workers to the offensive materials.

**Online Forums**

In a related vein, employers have also been held liable for failing to remedy harassment that occurs on an employer-provided online forum. Online forums are distinct from company-provided email, and are generally viewed by courts and employers as more of an online “bulletin board,” or place for co-workers to exchange ideas. The case of *Blakey v. Continental Airlines*, 751 A.2d 538 (N.J. 2000), provides an excellent example of how employer liability can arise in this context.

In *Blakey*, Continental Airlines (Continental) provided an online forum for its pilots, as a means for crew members to exchange ideas and information. However, several of its pilots abused the forum by using it to post inappropriate gender-based messages about the plaintiff, a female pilot. Before the misuse of the online forum, the plaintiff filed several complaints with Continental representatives detailing multiple instances of sexual harassment, including being shown pornographic photographs and being subjected to other vulgarities by her male counterparts while in the cockpit of airplanes. She then filed sexual discrimination and retaliation charges against Continental with the United States Equal Employment Opportunity Commission, and filed an additional claim against Continental for failing to remedy the hostile work environment of which she complained. Following these actions, several pilots posted criticisms of her professional abilities, and of her filing sexual discrimination and retaliation claims against the airline. *Id.* at 542-45.

The New Jersey Supreme Court found Continental liable for failing to remedy the harassment that took place on its online forum. The basis for the Court’s conclusion, was that Continental had notice that its employees were using the work-related forum in a pattern of retaliatory harassment directed at a co-worker, and as such, the airline was under a duty to remedy the harassment complained of. *Id.* at 552. In explaining this outcome to clients, it should be noted that this result is in line with other areas of employment law, in which liability is routinely extended to employers for failing to take steps to remedy workplace harassment once they are made aware of the problem. Another factor for emphasis is the nature of the online forum provided by Continental, which was intended to simulate a physical “bulletin board” upon which messages could be posted to airline employees. By stressing that such a bulletin board would be subject to monitoring and a certain level of control in a traditional office setting, a client’s understanding of how those expectations are being applied to online settings may be better fostered.

**Unauthorized Downloads Of Copyrighted Material**

It may come as a surprise to some employers, but even employees who are movie buffs or music aficionados can get them into trouble. Certain liabilities have been extended to employers for employee use of company computers to download copyrighted materials from the Internet. Clients who are Internet Service Providers ("ISPs") should be especially con-