

Client *Urgent* Briefing

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eTech Alert

A recent decision of the U.S. Ninth Circuit Court of Appeals could spell trouble for employers who surreptitiously access web sites run by their employees or others on which derogatory comments about the company are posted.

by Darrell A. Clay

In *Konop v. Hawaiian Airlines, Inc.*, a pilot for Hawaiian Airlines who opposed the current union created and maintained a website that included comments critical of the company, its management, and union leadership. Access to the website was limited by means of a password, which the pilot did not provide to anyone in management or affiliated with the current union's leadership. The pilot provided the password only to persons who agreed, as part of the registration process, not to disclose the contents of the web site.

Concerned about the possible content of the website, a company executive used, with permission, the password of another pilot who had registered with, but had never before accessed, the website. Over the course of the next four months, the same executive accessed the website some thirty-four additional times using this password and that of another pilot, who had also given permission to the executive to do so.

The Court found that the pilot could raise a claim against the company for a violation of the Electronic Communications Privacy Act, a federal law that prohibits the "interception" of "electronic communications." Individuals who violate the Act may be punished by imprisonment for as long as five years and a fine of up to \$250,000. Corporations that violate the

Act can be fined as much as \$500,000. In addition, the Act permits aggrieved persons to bring a private cause of action against the interceptor, and, if successful, recover civil damages of \$100 a day for each day of the violation - up to a maximum of \$10,000. The Appeals Court returned the case to the District Court to conduct a trial on the pilot's claim under the Act.

The Court did note that the Act would not be violated every time an employer viewed a web page. The Act contains an exception for electronic communications that take place through computer systems that are "readily accessible to the general public." This would appear to mean that if the pilot had not required registration and use of a password, the company would have been free to view his web site without fear of violating the Act.

Although binding only on the federal courts located in the western United States, the Court's decision was the first to construe the Act's application to web sites. Employers and other companies engaged in monitoring the Internet for potentially derogatory statements about them should thus be cautious in how they access restricted web sites. Walter & Haverfield's eTech Group will monitor the progress of proceedings in the trial court.

The eTech Group

Walter & Haverfield's eTech Group is composed of attorneys from our Business, Employment, Immigration, International, and Litigation Practice Groups who are well-versed in the technological and legal aspects of the Internet and e-business. The eTech Group offers an interdisciplinary approach to meet your individual business needs, including on-site diagnostic audits to help alert you to potential legal "trouble spots."

With the explosive growth of the Internet and electronic data interchange, businesses must now cope with legal issues not implicated by traditional brick-and-mortar institutions. For example, does selling a product over the Internet to someone in another state mean you might get sued or taxed in that state? Are there "truth-in-advertising" rules that must be followed if your home page reaches into other states? Is someone squatting on the domain name you want to register? Will OSHA's new workplace ergonomic rules affect the way you do business? How will the new health care privacy regulations impact your operations? Need help recruiting foreign workers and obtaining the

necessary visas to bring them to the U.S. or obtaining the necessary visas to bring one of your workers to the U.S. from one of your foreign operations? Want to develop an e-commerce business and need guidance?

Our eTech attorneys can answer these questions and more. Whether it's defamation, negligent misrepresentation, copyright, intellectual property, securities laws, gambling laws, venture capital concerns, electronic privacy statutes and common law privacy issues, not to mention the full scope of laws of other nations, we can help. The rich and fluid nature of the Internet demands that you have proper legal counsel as a necessary component of doing business in the Twenty-First Century.

More than advocates, members of the eTech Group are skilled counselors and advisors who stand ready to help embryonic businesses navigate the peculiar difficulties they face. We can help you refine that business plan, cultivate "angel" investors and venture capital sources, ease the transition from start-up to full-scale operation.



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The information in this newsletter is a summary of often complex legal issues and may not cover all the "fine points" related to a specific situation or court jurisdiction. Accordingly, it is not intended to be legal advice, which should always be obtained in consultation with an attorney.

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