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The Technology Shop

Internet: Legal Issues On the Superhighway

By Todd E. Marlette, Esq.

You've undoubtedly heard its name, but do you know what it is? The Internet is fast becoming the predominant communication network in America and around the world. National and regional networks connect millions of computer users through the Internet's web of intersecting transmission lines.

In 1989, there were approximately one million "packets" of information traversing the Internet monthly. By January 1994, this number increased to more than 45 billion packets monthly. With more than 20 million users in 135 countries and electronic mail costing mere fractions of a cent, electronic highways are reshaping the business community and invading our daily lives—whether we like it or not. Along with this new power comes substantial potential legal liability for unwary associations.



Typical Internet Applications

- **Electronic mail.** The most widely used Internet service is electronic mail. E-mail allows virtually instantaneous, cost-effective communication across the country and around the world. The cost

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The Human Resource

Defined Contribution Plans: Are You Tuned In to 404(c)?

By James W. Farnham

Does your association have defined contribution plans? Who is in control of retirement plan investments? Who directs investment dollars?

If the answers point in your direction, you are probably generally responsible for association employee investment allocation decisions. If so, you should pay particular attention to the provisions of section 404(c) of the Employment Retirement Income Security Act (ERISA).

Section 404(c) is elective—the employer is not required to comply with section

404(c). However, the consequences to employers of not complying with 404(c) may be that as a fiduciary, your association could be held responsible for the results of a participant's investment allocation decision. If those decisions are poor and lead to financial losses, lawsuits may result.

Meeting the requirements of section 404(c) can reduce concerns about fiduciary responsibility. Under section 404(c), by allowing plan participants to direct the investments in their accounts, the employer can transfer a substantial portion of

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of faxing a *single page* across the U.S. is approximately equal to a first-class postage stamp. In contrast, e-mail can instantly send *100 pages* to the same location for about the same cost.

- **Information access.** The Internet provides access literally to millions of information files—from news articles and digitized pictures to Supreme Court decisions, software, and more. Due to the amount of information, conducting a manual search for specific information is impossible. Fortunately, software programs are available to provide research assistance. For example, “Archie” is one program that helps locate files. “Gopher” is a browsing program that allows key word searches throughout information files. “Lynx” is a hypertext program allowing a user to view instantly documents that are cited within another document. “Finger” assists in locating user mailboxes. “Elm” and “Pine” assist in transferring mail between users.

- **Bulletin board servers.** Electronic bulletin board servers (BBS) are one of the most interesting features of the Internet. Bulletin boards are like “minicommunities” that allow interactive discussions and file transfers.

There are more than 100,000 local electronic bulletin boards across the U.S. Anyone with a personal computer, modem, and inexpensive BBS software can set up a bulletin board. BBSs offer an inexpensive and unique forum for business advertising and product support as well as platforms for placing orders.

Potential Liability

Though the Internet is indeed a lucrative communications tool, inherent hazards exist in the form of

potential liability. Since, each BBS is run by its own system operator or “Sysop,” there is often little or no control over the content of information available for dissemination. A lack of regulations and the relative ease of dissemination provide fertile grounds for liability. The

Internet user may potentially be liable for defamation, copyright and trademark infringement, misappropriation of trade secrets, and even criminal liability.

Recent court cases underscore the importance of establishing an effective association policy for Internet operations, and the best way to establish such a policy is through intellectual property counsel. One recent case held that mere dis-

tributors of information are not liable for the content of information. One can extrapolate that an adequate showing of authority and control over a defamatory publication may make the operator liable. Asso-

ciations, like any employer, are generally liable for employees’ actions within the scope of their employment. The outcome of recent cases may well rest on the degree of control by the service provider and the means of implementing such control.

Another important issue for associations on the Internet is the illegal copying and distribution of copyrighted material. Bulletin board users (your employees) can potentially upload and download numerous copyrighted works in a short period of

time. Since each act of copying constitutes a separate act of infringement, the potential damages assessed against an association could be substantial.

An association need not copy the material itself to be liable for copyright infringement: In a case of first impression, a Florida operator of a bulletin board was found liable for the distribution of copyrighted photographs. After finding irrefutable evidence of copyright infringement, the court held

Along with this new power comes substantial potential legal liability for unwary business employers

that the defendant’s knowledge of the infringing acts was not at issue, reasoning that

- intent to infringe is not needed to find copyright infringement. Intent or knowledge is not an element of infringement, and, thus, even an innocent infringer is liable for infringement.

The strict liability of copyright law underscores the need for adopting effective policies by trade or professional associations.

In addition to civil liability, the U.S. Department of Justice is seeking harsh criminal penalties for the distribution of copyrighted software. Associations should thus consider that criminal actions may be brought against their employees as a consequence of copyright infringement.

Recommendations

With little or no specific government regulation of the Internet, liability will generally follow common-law doctrines and time-honored constitutional principles. Generally speaking, your association may reduce its potential for vicarious liability by prescribing in

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the fiduciary responsibility to the participants. At the same time, the employer can allow participants to have greater control of their retirement portfolios including profit-sharing plans, money purchase pension, and 401(k)s.

To comply with 404(c), employers must meet the following criteria:

- 1) **Participants must be able to choose from a broad range of investment alternatives.** The plan must offer at least three core alternatives. Each must be diversified and have materially different risk and return characteristics. Company stock does not qualify as a core alternative. An example of three alternatives is a stock mutual fund, a bond mutual fund, and a money-market mutual fund.
- 2) **Participants must be able to direct investments in their accounts.** The ability to transfer between core alternatives must be available on at least a quarterly basis. More volatile investment instruments may require more frequent exchanges—perhaps monthly or, in some cases, daily.
- 3) **Participants must be given sufficient information about each fund.** The information should disclose

that the plan is designed to qualify under section 404(c) and include a description of each investment alternative (e.g., a prospectus), names of investment managers, directions on how to change investments, and a description of any fees or expenses that the participant may incur.

Communication, Education Requirements

In particular, 401(k) plans have seen increased competition in the employee communication packages being offered to plan sponsors. As a result of section 404(c) regulations, basic education on such topics as evaluating investment risk and return, asset allocation, dollar-cost averaging, and mutual fund investing is being delivered to plan participants via seminars, newsletters, and various sales literature. By providing a comprehensive employee communication package with the defined contribution plan, plan fiduciaries (employers) can reduce their liability for the invest-

ment directions participants choose.

Fiduciary Responsibility

A common misunderstanding about Section 404(c) is that if employers do follow the regulations, they have no fiduciary responsibility over the investments. This is not true—the employer still has fiduciary responsibility with respect to plan investments, especially if the employer chose the investment alternatives available within the plan. However, if you are an employer or a human resources administrator, meeting the requirements

... Meeting the requirements of Section 404(c) can alleviate part of your fiduciary concerns.

of Section 404(c) can alleviate part of your fiduciary concerns. As you examine your defined contribution retirement plan in light of section 404(c), make certain your plan properly allocates investment control to your employees. **D&C**

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writing the scope of an employee's duties with respect to the Internet. An effective policy should clearly restrict the copying and dissemination of copyrighted material such as software, photographs, and sound recordings. The policy should also prohibit the making of defamatory statements and the inclusion of confidential or trade-secret information on the Internet.

E-mail that is sent under the authority of your association may carry the same potential liability as a signed letter on company letterhead. Thus,

an association that provides e-mail should implement a policy regarding personal mail. Personal matters, internal gossip, trade secrets, and defamatory statements should be taboo topics for the Internet or e-mail. If your association decides to operate a BBS, you should implement policies against the distribution of copyrighted materials. BBS operators should also police their bulletin boards to ensure that their policies are being carried out.

The Internet raises the specter of a great new world of information at

your fingertips; it also increases the dangers of liability to your association. By implementing an effective Internet policy, your association may reap the benefits of the information superhighway while significantly reducing its exposure. **D&C**

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