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How private is employee email?

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Suppose that an employee is talking about your company on a social networking W eb site like Facebook or LinkedIn while at work. Or suppose that during a routine update, the employer's system cached email from the employee that is private in nature. Does the company have a right to examine those emails? Are they private even though the employee is using a work computer?

These might seem like straight forward questions, which appeared to have been resolved in the employer's favor a long time ago But recent state court decisions, including a ruling in the New Jersey Supreme Court and an appellate decision in California this month, indicate that, where cloud computing and s ocial n etworking are concerned, the answers are anything but clear.

There currently appears to be a differentiation between internal email services and external cloud-based or Social Media-based email regarding how far the employee's right to privacy extends. In light of the rapid development of communication technology, the Supreme Court of the United States recently stated that the court s have to proceed with caution as to the employee's privacy interests until the role of the technology in society is better understood.

Most courts have started with the question of whether or not a company has a specific Email policy. Based on the recent decision in California, your corporate policies, including your employee manual, should include the following language:

- Email communication is not private;

- Email is to be used only for company business
- Email communication is randomly and periodically monitored to ensure compliance.

It should be kept in mind, however, that the law on this issue varies from state to state. For example, in California, a case called *Holmes v. Petrovich*, allowed a company to use emails collected from an employee's account when the company had a policy that clearly spelled out the aforementioned conditions for using email.

In this case, an employee was communicating with her attorney from a work-based email system and then erased the emails once she sent them. This was in clear violation of the company's stated computer policy. The court said that the analogy in this case is that of an employee talking very loudly in the office so that the entire company could hear their conversation with their attorney. By doing so, the employee waived the attorney-client privilege.

But because of disagreement among the courts on this issue, it is essential to have legal counsel prepare your company's email policy and advise you with regard to the laws that will apply in your jurisdiction,

You might assume that, because your company policy covers your company's internal email system, it would also cover the use of external email providers, Web sites, and social media companies email. This is not necessarily so.

In *Stengart v. Loving Care Agency,* the New Jersey Supreme Court held that the use of a personal web-based email account accessed from an employee's computer at work, where the use of such an account was not clearly covered by the company's computer use policy, was private. The New Jersey Supreme Court stated that this result was especially appropriate when the emails at issue contained explicit warnings from an attorney that they were privileged communications.

To use the *Holmes* court's analogy, it would be like talking on a company phone quietly so that the conversation could not be heard by the employer.

One key factor in the New Jersey Supreme Court's decision is that there was no specific company policy regarding external cloud-based email. Therefore, in

addition to having an internal computer policy, your company will need an explicit external Internet/world wide web policy as well. Again, a skilled attorney should be enlisted to craft a policy that also covers non-work related email and the Internet.

The email policy should inform the employee that the company policy:

- Specifically covers the use of cloud based email providers;
- Specifically covers social media companies that have internal email;
- Informs the employee that such communications may be monitored by the company

The *Stengart* court observed that there are some communications that are so fundamentally private that even with an explicit ban on use of web- based email, the attorney- client privilege may still apply. However, the court did not go on to indicate what other communications might remain private despite an explicit employer policy to the contrary.

The issue of web-based email is currently unresolved. Therefore, as an employer, you need to proceed with caution. All your policies should be clear and broad enough to encompass the new and latest technologies.