

## **OESA Legal Corner E-Mail Troubles: Can Your Company's Handbook Help You in Employment Litigation?**

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Have you ever considered whether your company has a right to use an employee's e-mail communications with his or her attorney conveyed through your company's system? A company's defense in an employment lawsuit can be impacted by this important question and courts are looking to the company's employee handbook and policies for the answer. The scenario goes like this: employee begins to have alleged issues, employee uses the company system to communicate with a personal attorney about those alleged issues, employee leaves and pursues an action against the company, and company finds the employee's communications with his or her personal attorney on the company system. Often, those communications provide a clear version of the facts that will bolster the company's defense. Sometimes, the communications can support an offensive action against the employee. Next step: Litigation over whether the employee's e-mails can be used by the employer in a lawsuit or whether the now former employee can protect those communications by asserting attorney-client privilege.

Courts in a number of states have relied on the employer's handbook and policies to determine whether the employer has a right to use the employee's e-mail communications in litigation. The key issue in all cases has been whether the employee had any expectation of privacy when using the employer's computer systems or whether that expectation was extinguished by the employer's handbook or policies. If an expectation of privacy existed, the employee's communications with his or her personal attorney were often-times found protected and the employer was not allowed to use them offensively or defensively in the employment lawsuit. Conversely, if the handbook or policies extinguished the employee's privacy rights, courts usually permitted the employer to use the employee's communications with his or her attorney against the employee in the lawsuit.

A clear picture of what it takes to extinguish an employee's privacy rights in e-mail conveyed through an employer's computer system is developing through the courts. By way of example, this year in Tennessee a trial court found that a Chief Operating Officer's e-mail communications with his personal attorney sent through the company e-mail system were not privileged and could be used by the company in subsequent litigation commenced by the COO against the company. The company's policy on computer and internet usage made clear that all e-mails were company property, that personal use of the company system was prohibited, and that all use of the company system and data composed, sent or received through that system could be monitored, retrieved and read by the company.

Court rulings in New York, New Jersey and California also have hinged on language contained in the employer's handbook or policies. In one New York case, a policy stating that employees had no personal privacy right in any material created, received, saved or sent using the employer's computer system resulted in the employer being able to use an employee's communications with his personal attorney to defend a multi-million dollar suit for wrongful termination. In another case, the fact that the e-mails were sent using the employee's personal, web-based e-mail account as opposed to the company e-mail account did not change the outcome. Instead, the employee's personal e-mails with her attorney could be used by the employer to defend a harassment lawsuit when the employee had used a company-provided computer and internet service because the employer's policy clearly extinguished any employee expectation of privacy. Most importantly, the employer had a written policy prohibiting personal use of the company systems and stating there was no personal privacy in any data conveyed through or using the company's systems.

An employer's use of an employee's e-mail communications with his or her personal attorney in subsequent litigation commenced against the employer by that employee is dependent upon the employer's handbook or written policies. Strong internet, computer and electronic communications policies can result in a clear right of the employer to use the employee's e-mails to "set the record straight" in a lawsuit being pursued by that former employee. Have you reviewed your policy lately? An ounce of protection can sometimes lead to a strong defense.



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