

## **N.J. HUMAN RESOURCES LAW ALERT™**

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### **EMPLOYEE PRIVACY: EMPLOYEE MAY HAVE RIGHT OF CONFIDENTIALITY TO CERTAIN NON-BUSINESS EMAILS SENT AND RECEIVED ON COMPANY COMPUTER**

Since the dawn of email communications, employers have generally required that email be used only for business purposes, and have enforced that policy by asserting their right to inspect such emails. The reasoning underlying the policy is simple: If the employer supplies the computer terminal, and the emails are sent and received on company time, then those communications are the property of the employer, and the employee forfeits whatever privacy interest he might otherwise have in them.

This seemingly simple issue just became more complicated. The New Jersey Supreme Court has now held that the employer's legitimate business interests must sometimes give way to other important public policies, such as where the emails in question are privileged communications between the employee and his lawyer. The Court also emphasized that an employer must be particularly clear in warning its employees if the employer intends to enforce a policy that waives confidentiality not only as to email sent through the employer's own email program, but also as to those sent through Web-based email services accessed through company computers.

#### **FACTS**

Plaintiff Marina Stengart's employer, Loving Care Agency, issued to her a laptop computer for company business. She used the laptop to send and receive emails through her company email account and to perform other company business, but also occasionally used the laptop

to access the internet and her private, password-protected Web-based email account through the employer's server. Unbeknownst to her, the browser software of her laptop computer automatically saved a copy of each Web page she viewed. After her employment was terminated and she filed a discrimination lawsuit, the employer hired a forensic specialist, who was able to retrieve not only plaintiff's business-related emails but also the personal emails she sent through her Web-based account -- including emails between plaintiff and her attorney discussing her issues with her employer.

The employer felt it was on solid ground in reviewing the emails of its former employee because it had a published policy which stated that emails, internet communications, and computer files were the company's business records and "are not be considered private or personal" to employees.

The issue before the Supreme Court was whether the emails between the employee and her attorney, sent and received through her personal Web-based mail account but over her employer's server, were protected by the attorney-client privilege, or whether the employee had waived that privilege by engaging in the email communications in the face of the company's published policy.

#### **THE SUPREME COURT DECISION**

The Supreme Court found that the emails were indeed protected by the attorney-client privilege, notwithstanding the employer's policy.

In its opinion, the Supreme Court emphasized the importance of a clear company policy which gives the employee adequate notice of what computer activity was being monitored and how

it was being monitored by the employer. In this case, the employer's electronic communications policy was unclear as to whether the use of a personal, password-protected, Web-based email account via company equipment was subject to the policy.

Further, the policy provided no notice that messages sent or received on a personal web-based email account were subject to monitoring if company equipment is used to access the account. The policy also did not warn employees that the contents of such emails are stored on a hard drive and could be forensically retrieved and read by the employer.

In light of the lack of clarity in the policy and because the employee had taken measures to ensure her privacy by using a private, password protected email account, the Court found that the emails were privileged. The Court also noted that the emails were not illegal or inappropriate materials stored on defendant's equipment which might cause harm to the company.

The Court, however, emphasized that its ruling in the case is somewhat limited. The expectation of privacy in e-mails with lawyers does not mean that employers cannot monitor or regulate the use of workplace computers. Companies may adopt lawful policies relating to computer use to protect the assets, reputation, and productivity of a business and to ensure compliance with legitimate corporate policies. And employers may enforce such policies and discipline employees for violations.

## CONCLUSION

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This decision points up the need for careful drafting of employee manuals and company policies. In particular, policies concerning the use of email, the internet and other electronic media must be tailored to meet reasonable and legitimate company needs. Policies must also give employees adequate notice about what computer activities are being monitored and how they are being monitored. Legal counsel should be sought when crafting or revising company-wide electronic communications policies.

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**Sean R. Kelly, Esq.**, a Partner in the firm's Employment Law Practice Group, has over 30 years experience in advising and defending employers. A graduate of Yale College and Georgetown Law, Mr. Kelly is a former Master of the Sidney Reitman Employment Law Inn of Court, is Certified by the New Jersey Supreme Court as a Civil Trial Attorney, and frequently publishes and lectures on employment law before business and legal professional groups.

For more information on any of the items appearing in the Alert™ you may contact Mr. Kelly at the phone number or e-mail address listed below.

Also, if you know of others in the New Jersey Human Resources community who we should add to our mailing list, please send their mailing addresses to [skelly@saiber.com](mailto:skelly@saiber.com).

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