

An Office E-mail Policy—Silence Is Not Golden

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An Office E-mail Policy—Silence Is Not Golden The list of defendants reads like a who's who of Fortune 500 companies. What do they have in common? In each case, employee e-mail has led to litigation and/or settlements between the company and one or more employees. E-mail that may seem innocuous to some can form a hard record for the growing number of cases brought against companies for invasion of privacy and discrimination or harassment claims based on race, color, religion, sex or national origin. The clear lesson — failing to enunciate and enforce an e-mail policy for corporate employees is risky business.

The Pitfalls of E-mail

The same features that make e-mail an increasingly attractive medium for office communications make it a potentially devastating tool for litigators suing businesses. For users, e-mail is immediate and informal, often times leading employees to jot an irreverent note or forward an off-color joke that they would never put on the company letterhead. Due to its global nature, e-mail can carry "water cooler" banter or off-color jokes around the globe faster than they can make their way across the company lunch room.

E-mail is fully discoverable in litigation, and the first action of many plaintiff's attorneys is to immediately demand all e-mail files. For litigators, e-mail is an ideal evidentiary tool because it is compact and storable, and oftentimes much more permanent than senders or recipients believe (witness Oliver North's dismay when e-mail thought to be deleted was found on NSC hard drives). Searches of tens of thousands of e-mail documents that would take usually hundreds of hours in hard copy format can be performed nearly instantaneously by electronic word searches.

Although it appears ephemeral to senders, e-mail appears as hard, cold, permanent evidence in a courtroom. The case against a company need not be constructed on the basis of fallible memories: a series of off-color e-mail jokes exchanged over a period of months between buddies and soon forgotten furnishes a permanent record.

Why An Office E-mail Policy?

By defining what e-mail is appropriate and what is inappropriate, an office e-mail policy can help inoculate a company from liability by establishing the fact that sending potentially incriminating or infringing e-mail (such as racist or sexist jokes) is outside the scope of employment, a basic defense in negating corporate liability for employee actions. Similarly, an office e-mail policy can help protect a company from employee charges of

invasion of privacy by explaining clearly to employees precisely when their e-mail is private, and when it is not. An office e-mail policy can also help educate employees by clearly laying out what sort of communications are inappropriate, thus eliminating the raw material for potential litigation in the first place. Finally, a complete corporate e-mail policy would address on-line issues such as copyright and trademark violations, libel, fraud, electronic record retention, and encryption.

What Should An E-mail Policy Look Like?

No e-mail policy will fit "off the rack." The extent of oversight that your company chooses to employ, and the extent of privacy that your company chooses to extend to employees, will vary with your corporate culture. There are other considerations as well. For example, a firm that sells products or services to the Federal Government may be required under Federal law to retain certain electronic records for many years. The Electronic Messaging Association offers a privacy tool kit that addresses employee privacy issues. To address the full spectrum of e-mail issues, there are a few law firms, including our own, who can assist a company in tailoring an e-mail policy to fit its culture and specific needs. A first draft can usually be done on-site in the course of a day of interviews.

Most important, however, is to put an e-mail policy in place immediately – even if the policy is only an interim one. Such a policy will, as noted above, reduce potential liability for invasion of employee privacy and reduce the chance that inappropriate employee communications will be imputed to the company.