New Jersey Supreme Court Provides New Guidance on Employer E-mail Policies

Client Advisories

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On March 30, 2010, in *Stengart v. Loving Car*e, the New Jersey Supreme Court upheld and clarified the decision of the Appellate Division, which generally held that an employee has a limited right to privacy when using his/her employer's computer for personal matters. Read here for our previous alert and a full explanation of the facts in the case.

The Supreme Court's central holding -- that an employee's e-mail communications with her attorney on her company issued laptop computer, but sent through her personal, web-based Yahoo! e-mail account are private and protected by the attorney-client privilege -- is not surprising. The attorney-client privilege is enshrined in history and practice, and there is a strong public policy in enforcing and upholding the attorney-client privilege. The legal system strives to keep private attorney-client conversations to foster full, candid, and confidential exchanges of information. Due to important policy concerns underlying the attorney-client privilege, even if the company's policy had contained unambiguous notice that an employer could retrieve and read an employee's attorney-client communications, such a policy would not be enforceable.

More instructive for employers is the Supreme Court's examination and guidance as to an employer's ability to monitor and enforce computer use policies in the workplace. The Court recognized that the rapid development and use of technology in the workplace has created increasing struggles for employers with respect to monitoring and enforcing computer use policies as well as issues of employee privacy. It explained that in this case, the company's computer-use policy was ambiguous and that the employee did not have express notice that messages sent or received on a personal, web-based e-mail account would be subject to monitoring. Further, the policy did not warn employees that the contents of such e-mails were stored on a hard drive and could be forensically retrieved and read by the company. These are some of the provisions that should be addressed in all company computer-use policies.

The Court opined that, as written, the company's policy created ambiguity about whether personal e-mail use was company or private property. Further, while the policy was insufficient to clearly communicate to an employee what to expect with respect to privacy in using the company's computer, the Court stated that a zero-

tolerance policy banning personal e-mail might possibly be unworkable and unwelcome in today's dynamic and mobile workforce, and the Court specifically commented that it did not seek to encourage that approach in any way.

The *Stengart* decision supports employers who adopt lawful policies relating to computer use to protect their assets, reputation, and productivity of the company and to ensure compliance with legitimate corporate policies. The Court highlighted the fact that the e-mails at issue were not illegal or inappropriate material stored on the company's equipment, which might harm the company in some way. Employers can discipline employees, and when appropriate, terminate them, for violating proper workplace rules that are not inconsistent with a clear mandate of public policy. As an example, an employee who spends long stretches of the workday getting personal, confidential legal advice from a private lawyer may be disciplined for violating a policy permitting only occasional personal use of the Internet. However, the *Stengart* decision highlights that an employer would have no need or basis to read the specific contents of personal, privileged attorney-client communications to enforce corporate policy.

The Court explained the need for employers to have detailed, unambiguous computer use policies which specifically indicate to employees what level of privacy they can expect with respect to their use of the company's computers, or Internet, even with respect to a personal, password protected e-mail account. In light of this decision, employers need to carefully analyze their computer and internet use policies to ensure that they are clear and thorough. Further, employers need to be aware that if they come across e-mail an employee may have sent to an attorney, the employer cannot read the e-mail between the employee and the attorney, nor can the contents of the e-mail be used to discipline the employee.

If you have any questions about the *Stengart* decision or would like a review of your computer use policy, please contact Archer's Labor and Employment Department at (856) 795-2121.

Seminar Note: Archer will be holding a free half-day Labor and Employment Seminar at Foresgate Country Club on April 9, 2010. For more information or to register click here or email rsvp@archerlaw.com.

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