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**PRIVACY & INFORMATION  
SECURITY UPDATE**

**Reading Employees' Emails: A New Risk?**

Businesses routinely advise their employees that when they use company IT assets for even personal communications, the company is free to access and review those communications. Many U.S. courts have upheld this process, and some recognize the employer's right to access employees' emails even in the absence of such a notice. A recent New Jersey decision, however, casts some doubt on this conventional wisdom, at least where the emails and other electronic communications contain arguably privileged communications between the employee and her own lawyer.

In *Stengart v. Loving Care Agency Inc.*, 973 A.2d 390 (N.J. Super. Ct. 2009), the court weighed in on the side of the employee, holding that the employer could not access the employee's email communications with her lawyer even when the emails were transmitted over the company's IT system. The court held that attorney-client communications that were sent on company computers remained privileged even in the face of corporate policy that designated that these emails were corporate property and open to the employer's review. To compound the effect of the ruling, the company's outside counsel who also reviewed the emails was disqualified from representing the company in litigation brought by the employee.

In some prior cases, such as *Sims v. Lakeside Sch*, No. C06-1412RSM, 2007 U.S. Dist. LEXIS 69568 (W.D. Wash. Sept. 20, 2007), courts similarly have held that public policy interests underlying attorney-client privilege trump a company's IT policies that purport to permit the review of employee emails. In these past cases, however, courts have specifically distinguished between emails sent using a web-based email provider (such as gmail or AOL) accessed through a company laptop or desktop computer that may be protected by the privilege, and emails sent using the company's email system (such as a company-provided and operated Outlook system), which have been held not to be protected from employer review by the attorney-client privilege. *Stengart* may go a step farther on the side of the privilege. Although the emails in question in *Stengart* were sent using a web-based email provider (and not the company's email system), the court's holding was based on the understanding that the "important societal considerations that undergird the attorney-client privilege outweigh the employer's claimed rights of ownership," a justification that would seemingly apply equally to emails sent over a company-provided email system.

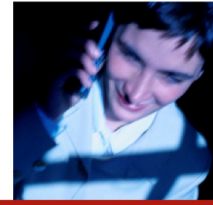
Other precedent, such as the oft-cited decision in *In re Asia Global Crossing Ltd.*, 322 B.R. 247 (Bankr. S.D.N.Y. 2005) condition the applicability of the privilege to the communications on whether the employee had a reasonable expectation of privacy in those communications. The court in *Asia Global Crossing* set out the following four factors to determine whether an employee has a reasonable expectation of privacy:

- Whether the company maintains a policy banning personal use or other objectionable use;
- Whether the company monitors the use of the employee's computer or email;

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- Whether third parties have a right of access to the computer or e-mails; and
- Whether the corporation notified the employee, or the employee was aware, of the use and monitoring policies.

At the other end of the spectrum, some courts either have declined to recognize the privilege or held that it be waived in the face of a communicated corporate policy reserving the employer's right to review employee emails.

Because of the differing opinions on this issue, employers should tread carefully in establishing procedures for reviewing employee emails to avoid later sanction for invading the attorney-client privilege. Companies operating outside the United States may be subject to additional requirements or limitations before they can access employee emails generated through international IT resources.

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#### **FOR MORE INFORMATION**

If you would like more information on navigating the post-*Stengart* landscape of employee attorney-client communications, please contact:

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