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The Continuing Importance and Impact of E-mail Retention and Destruction Policies

By Ola A. Nunez

In a time where the use of social media technologies, like Facebook, Twitter, and LinkedIn, are playing an increasing role in employment litigation, the threats offered by e-mail usage are often considered an afterthought or perhaps forgotten altogether. Yet, with the ubiquitous nature of e-mail in the workplace, some employers fail to fully consider or appreciate the potentially harmful consequences e-mail use can have on the workplace and throughout the course of litigation. Indeed, as with anti-harassment and anti-retaliation policies, a well-drafted e-mail usage policy is becoming the sort of policy that should be revisited and updated over time or, for newer businesses just implementing general policies for the first time, drafted correctly from the start.

Moreover, if your company does not have an appropriate policy for the handling, retention, and destruction of e-mail (and other electronic records), it can possibly cost your company in sanctions or penalties for spoliation of evidence, *i.e.*, the intentional or negligent withholding or destruction of relevant evidence, or for other violations of federal or state law. Further,

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your e-mail handling and retention policy, or the absence of one, can impact your ability to investigate and defend against claims such as the one described above. Therefore, it is important to consider whether your company has an appropriate e-mail handling and retention policy in place that can withstand the rigors of litigation. In evaluating your company policy, keep in mind the following considerations:

1. **Outline permitted and prohibited e-mail content.** Your e-mail usage policy should be clear, concise, and in writing, and it should outline permissible and prohibited content, including types of documents, images, and text, in all e-mails transmitted over the company's e-mail system. While it is certainly advisable to have a content filter in place to prevent or intercept the transmission of e-mails containing prohibited content, no filter is fool-proof. Thus, it is important to include rules related to the use of e-mail, especially for messages unrelated to business, so that it is clear that the use of profanity; obscenity; and sexual or racist jokes, slurs, innuendos, or images are expressly prohibited. By advising employees that all workplace policies relating to conduct, such as those anti-discrimination and anti-harassment policies contained in the employee handbook, apply at all times when using the company's e-mail system, you can be in a better position to argue that you took meaningful steps to prohibit harassment in the first place.

As with other conduct policies, the e-mail policy should be included in the employee handbook. Your policy should also contain a disclaimer that e-mails are not private and may be monitored at any time. Although some states require employers to provide this notice, it is a prudent practice to provide such a notice in any case since, without this disclaimer, a company might not be able to conduct a full investigation of a claim of harassment or discrimination without potentially exposing itself to a lawsuit claiming a violation of an employee's right to privacy. Further, violations of an e-mail usage policy should subject employees to discipline, up to and including termination of employment, which further serves to reinforce how serious your company takes the policy.

2. **Set the parameters for e-mail retention and deletion.** Consider setting an internal retention policy that sets forth the manner and location in which e-mails are to be stored and deleted, including the length of time that an e-mail will be maintained on the server or on backup tapes before it is overwritten or automatically deleted. Since courts can require production of e-mails stored on employees' local hard drives and workstations, which can be both costly and time consuming, consider whether to utilize a centralized archival system so that employees are unable to save messages in personal folders. Also, remember that while your company can factor cost into its determination about the length and manner of storage, the policy must take into account any

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regulatory preservation periods and other requirements applicable to your industry, such as those imposed by the Sarbanes-Oxley Act of 2002, the Health Insurance Portability and Accountability Act of 1996 (HIPAA), and the Financial Industry Regulatory Authority, Inc. (FINRA), as well as any statutes of limitations applicable to employment-related claims as set forth in federal and state legislation. Further, the policy should address requirements for maintaining data in its original, unaltered state, protecting it against internal and external security threats, and maintaining its accessibility within a suitable time frame.

3. **Accommodate litigation holds.** Since your retention policy will be instrumental to your defense in litigation, it should also enable the execution of litigation holds. A litigation hold, issued once a company receives notice of a lawsuit, requires the company to preserve and maintain all documents and e-mails that are relevant to the claim. This may require the retrieval and preservation of e-mails that are scheduled for impending automatic deletion, so the policy and system should enable the halting of automatic deletion in accordance with the hold. Failure to prevent e-mails from automatic deletion, or even accidental deletion by employees unaware of the hold, can result in sanctions. For this reason, upon issuance of a litigation hold, it is critical that pertinent employees are made aware of the litigation hold and reminded of their responsibilities under the e-mail retention policy.
4. **Inform and educate your employees about the e-mail policy.** Ensure awareness and understanding of the e-mail handling and retention policy by informing and educating employees about content limitations and the procedures for maintaining and deleting e-mails. In addition to its inclusion in the employee handbook, the policy should be conveyed to employees in a manner that is feasible for your company, such as through posting in a noticeable location and through compliance trainings and seminars. Regardless of the methods you choose to inform and educate your employees, you should obtain and maintain employee training attendance records and any "acknowledgments" that they have signed that indicate their receipt, understanding and agreement to abide by the company's e-mail and other related policies.

Implementing an e-mail handling and retention policy that is appropriate to your workplace and is clearly communicated to employees in accordance with the above guidelines can help you avoid claims of harassment or discrimination from arising in the first place. Additionally, it serves an important purpose in ensuring that, if a claim does arise, your company will be able to promptly and lawfully investigate and defend against it and be in compliance with applicable regulations and laws.

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