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EMPLOYMENT NEWS ALERT

APRIL NEWSFLASH

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EMPLOYEE PRIVACY TRUMPS COMPANYôS RIGHT OF ACCESS

The NJ Supreme Court Gives Guidance to Employers

New Jersey employers should rejoice! Just 2 weeks ago, the Court issued its ruling in ***Stengart v. Loving Care Agency, Inc.***, *2010 N.J. LEXIS 241 (March 30, 2010)* finding that an employee who used the companyôs computer to exchange emails with her attorney had a reasonable expectation of privacy in those emails. At first blush, one might ask why companies should órejoiceô when the Court ruled in favor of the employee. Quite simply, it is because the NJ Supreme Court has finally given employers some desperately needed guidance on how to implement and manage your policies for employeesô use of company email systems, as well as for records retention and company proprietary information.

Though the ***Stengart*** decision arises from a controversy involving attorney-client communications, which have historically been a cornerstone of óprivacy rightsô jurisprudence, it is apparent that the ruling will have a broader impact on the workplace and will likely influence company privacy rules throughout the nation. An utter lack of case law across the country on these fast-developing issues and their effects on the workplace has once again put New Jersey at the forefront of this evolving area of the law, requiring employers to now carefully review and re-formulate their policies to strike the right balance between the companyôs proprietary rights and their employeeôs privacy rights.

A review of the Courtôs ruling in ***Stengart***, a relevant portion of which has been excerpted below, states:

> ñé that Stengart had a reasonable expectation of privacy in the e-mails she exchanged with her attorney on Loving Care's laptop. Stengart plainly took steps to protect the privacy of those e-mails and shield them from her employer. She used a personal, password-protected e-mail account instead of her company e-mail address and did not save the account's password on her computer. In light of the language of the Policy é , her expectation of privacy was also objectively reasonable. As noted earlier, *the Policy does not address the use of personal, web-based e-mail accounts accessed through company equipment. It does not address personal accounts at all. Nor does it warn employees that the contents of e-mails sent via personal accounts can be forensically retrieved and read by the company. Indeed, in acknowledging that occasional personal use of e-mail is permitted, the Policy created doubt about whether those e-mails are company or private property (emphasis added).* Moreover, the e-mails are not illegal or inappropriate material stored on Loving Care's equipment, which might harm the company in some way. é Under all of the circumstances, we find that Stengart could reasonably expect that e-mails she exchanged with her attorney on her personal, password-protected, web-based e-mail account, accessed on a company laptop, would remain private.ò

WHAT CAN YOUR COMPANY DO RIGHT NOW?

We have highlighted in the excerpt above what HR managers and GCs across NJ will now have to consider in drafting their email policies, as well as their records retention policies pursuant to any number of compliance statutes and regulations such as HIPAA, Sarbanes-Oxley, etc. Once again, timely review and revision of your policies is a crucial step in any litigation avoidance framework! ***We have already created draft policies that you can apply to your Company's unique workplace. We can help you implement the right policies to address these issues! CALL US NOW!***

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