

Practical Reminder: Personal Email Is Discoverable

Labor & Employment Law Update

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Last week, a federal judge presiding over a sex discrimination case ordered several members of management to search their personal email accounts and turn over all relevant information. The ruling serves as a reminder of the sheer breadth of discovery in litigation, especially in the context of “electronically stored information” or “ESI.”

As a general rule, parties to federal litigation “may obtain discovery regarding any non-privileged matter that is relevant to any party’s claim or defense...” Federal Rule of Civil Procedure 26(b)(1). State courts apply similarly broad standards.

Technological advances have transformed the way business communicates. Along with their many advantages, email and other now ubiquitous forms of electronic communication, have complicated the discovery process by vastly increasing the volume of “documents” that must be turned over in litigation. Federal court rules specifically address ESI, requiring the production of relevant information “stored in any medium.”

Furthermore, a party to litigation (or indeed a non-party served with a subpoena for documents) can be compelled to produce ESI inclusive of its “metadata.” Metadata is background information embedded in all electronic documents and communications which reveals information, such as when the document was created, accessed, modified, sent, and forwarded.

A few easy steps will go a long way toward keeping your email house in order:

1. **Ban Personal Email for Company Business.** Publish a clear policy prohibiting the use of personal email accounts for company business.
2. **Email Messages Are Business Records.** Remind employees in your email policy that email messages are official business records subject to corporate retention requirements and discovery. Further, remind employees that all email communications, including internal email communications, should reflect the same professionalism and attention to detail that would be afforded other forms of written communication. If you wouldn’t put it on letterhead, it doesn’t belong in an email!
3. **Consistent Enforcement.** Ensure your policies are consistently enforced. Employees who use their personal email accounts to conduct company business should be called out and warned that such practices must be

discontinued or face disciplinary consequences. Those who become lax in their use of company email should be reminded that email messages are official business records and instructed to treat them as such. Ultimately, those who fail to heed these directives should be issued discipline.

Bottom Line: There is no way to *guarantee* your managers' personal email accounts are beyond the reach of discovery. But taking these easy steps now will go a long way toward limiting ESI discovery to technology platforms within the company's control and streamlining the discovery process when litigation arises.

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