

LABOR AND EMPLOYMENT LAW ALERT

This alert was written by Jonathan B. Orleans and Daniel A. Schwartz and is published by our Labor and Employment practice. Please feel free to contact any of our attorneys listed below for more information.

Labor & Employment Law Section

Megan Youngling Carannante	860-424-4325 mcarannante@pullcom.com
Cara A. Ceraso	203-330-2246 cceraso@pullcom.com
Andrew C. Glassman	860-541-3316 aglassman@pullcom.com
Joshua A. Hawks-Ladds	860-541-3306 jhawks-ladds@pullcom.com
Tiffany G. Kouri	860-424-4360 tkouri@pullcom.com
Michael N. LaVelle	203-330-2112 mlavelle@pullcom.com
Adam S. Mocchiolo	203-330-2128 amocchiolo@pullcom.com
Jonathan B. Orleans	203-330-2129 jborleans@pullcom.com
Richard C. Robinson	860-541-3333 rrobinson@pullcom.com
Daniel A. Schwartz	860-424-4359 dschwartz@pullcom.com

This alert is intended for educational and informational purposes only. Readers are advised to seek appropriate professional consultation before acting on any matters in this update. This report may be considered advertising. ©2011 Pullman & Comley, LLC. All Rights Reserved. To be removed from our mailing list, please email unsubscribe@pullcom.com, with "Unsubscribe" in the subject line. Prior results do not guarantee a similar outcome.

Communication with Counsel from Employer's Computer Can Mean Waiving Attorney-Client Privilege

A California court recently held that an employee who used a company email system for communications with her counsel concerning her pregnancy discrimination claim did not "communicate in confidence" and was not entitled to the protection of the attorney-client privilege.

The California decision contrasts with last year's ruling by the New Jersey Supreme Court, in *Stengart v. Loving Care Agency* [<http://lawyersusaonline.com/wp-files/pdfs-2/stengart-v-loving-care-agency.pdf>], that an employee did have some expectation of privacy in e-mails she sent to her attorney using work computers. That case became one of the most talked about cases of 2010.

In the more recent case, *Holmes v. Petrovich Development Company* [<http://lawyersusaonline.com/wp-files/pdfs-2/holmes-v-petrovich-development.pdf>], the California Court of Appeals said:

"[T]he e-mails sent via company computer under the circumstances of this case were akin to consulting her lawyer in her employer's conference room, in a loud voice, with the door open, so that any reasonable person would expect that their discussion of her complaints about her employer would be overheard by him. By using the company's computer to communicate with her lawyer, knowing the communications violated company computer policy and could be discovered by her employer due to company monitoring of e-mail usage, Holmes did not communicate 'in confidence by means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted.' (Evid. Code, § 952.) Consequently, the communications were not privileged."

continued >

What are we to make of this apparent split in how courts are treating this issue (understanding there are also differences in state laws)? First, there are certain factual distinctions that may be important. The employee in *Stengart* used a work computer to communicate with her lawyer, but used a webmail account (like gmail or hotmail) and was not aware that the employer had the capability to retrieve the messages. Nor did the employer's policy expressly warn her that the company had that capability. In contrast, the employee in *Holmes* used her company email account and the employer had an electronic use policy expressly notifying the employee that such communications were not private and that such data was the property of the company.

Second, for employers, the lesson is that it is important to have a detailed policy on the use of electronic systems that specifies that employees have no expectation

of privacy in personal communications using the company's equipment and/or email accounts. Connecticut employers should note that Connecticut General Statutes Section 31-48d requires written notice to employees that the employer may engage in electronic monitoring.

Third, even where the employer has a clear, detailed, and appropriately publicized policy, in-house and outside counsel who retrieve arguably privileged information from the employee's work computer or shared storage space should proceed cautiously and consult the applicable Rules of Professional Conduct.

Finally, for employees, it clearly is foolishly risky to communicate with an attorney using their employer's email system. Attorneys representing employees should warn them to use a personal computer, wireless phone, or Blackberry for communications they intend to be confidential.

PULLMAN
& COMLEY_{LLC}
ATTORNEYS