Best email practices to avoid legally binding contracts or litigation

In this article, Oklahoma City Attorney A. Michelle Campney discusses email practices that could be considered legally binding.

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What are the general legal concerns regarding conducting business through email?

It is estimated that there will be almost 3 billion email users by the end of this year, with an average of 128 business emails sent and received per person, per day. Often, only

passively mentioned in employee handbooks and with little to no training during onboarding, employers and employees adopt varied practices for email use. The sheer volume of emails creates logistical problems for businesses (e.g., server space, data protection), but it can also create legal issues when exchanges can bind companies or reveal confidential, privileged or personal information.

How can emails bind someone until they actually sign an agreement?

Does the party you are working with know that you require hard copy agreement with handwritten signatures? If not, and if the email contains all the material terms and the facts, and circumstances surrounding that show that you were conducting the transaction electronically, then you could have an enforceable agreement under the Oklahoma Uniform Electronic Transactions Act ("UETA").

But no one actually signed the agreement, so how can it be enforceable?

Not all agreements have to be signed to be enforceable, and specifically under the UETA, a signature only need be "attributable to a person if it was the act of the person." Furthermore, an electronic signature under the act is "determined from the context and surrounding circumstances at the time of its creation, execution, or adoption … ." While Oklahoma does not have any case law on the issue, a Texas court found a simple "Thank you, Clyde" typed above the signature block was sufficient for a signature. Parks v. Seybold (Tex. App.—Dallas, 2015). Additionally, some courts (including those in Texas) broadly interpret the signature requirement to include an automatically generated signature block.

What are other potential concerns for email?

Let's say that your company is involved in litigation

regarding a contractual dispute. Most attorneys ask that all communications, including email communications, regarding the issue be turned over during the discovery process. While the communication may not ultimately be admissible in court, if there are emails between employees discussing the dispute and the surrounding facts and circumstances, those will generally have to be turned over to the other side. Additionally, if certain individuals are involved then you may have to turn over all emails regarding that person. Thus, if any mentions of any disciplinary action regarding that person or even your own personal feelings about the person are on email those may have to be turned over. While the emails may not ultimately impact your case, they could embarrass your company.

Are there any practices or policies that would help alleviate the concerns surrounding email?

While policies and procedures will be specific to each type of business and its standard practices, at the most basic level, having a robust email use policy will set a good foundation and, if properly drafted, help educate your employees on what to do and not to do. One important thing to remember is that email will only continue to grow as a means of communication. Setting good groundwork for how it is to be used in your company may help prevent issues down the road.

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