

Email Disclaimers

What are they?

Do we need them?



A summary of email disclaimer requirements from around the world. We explain what email disclaimers are, whether you are legally required to have one, as well as how one may legally assist your company.

What is an Email Disclaimer?

An email disclaimer is a notice or warning which is added to an outgoing email and forms a distinct section which is separate from the main message. An email disclaimer can also be called an email disclosure, footer, sign-off or confidentiality notice. Generally, an email disclaimer is an automatic addition to an organisation's emails that is designed to try and cover breaches of confidentiality, propagation of viruses, contractual claims and employee liability.

Why do I need one?

For the common business email user, it's very likely that you need a disclaimer simply because you've been told that you need one. It could be that your boss or your legal department has enforced the requirement of an email disclaimer on all emails leaving the organisation. But why does your organisation need them? Most often it will be because the law requires your organisation to have specific disclaimers.

Emails may contain professional advice or representations relating to business transactions. If the advice turns out to be bad or the representations false, the recipient could sue the sender for negligent misrepresentations. That's why companies sometimes include disclaimers saying that the content of the email is not to be relied upon.

Email disclaimers are definitely not a clear-cut method of liability protection when it comes to the contents of an email. Nevertheless, they may come into play within the court system and will, in many cases, deter others from trying to sue your company over an email. The court will look at all the facts and circumstances when determining whether or not an attorney-client relationship exists. In certain situations, a disclaimer can make a big difference.

"Although some disclaimers are legally useful, and a few are even required, most of them have limited effect. But they rarely do any harm, which is why people tend to use them."

– Adam Freedman, New York Law Journal

What can Email Disclaimers protect me from?

There is no legal authority on the effectiveness of the use of a disclaimer in email messages; but that is not to say that they should not be used. Provided care is taken in drafting the email disclaimer, they may protect you from confidentiality breaches, virus transmission liability, unintentional contracts, negligent misstatements and employer's liability – we will go through each briefly.

"People use email disclaimers to protect themselves against legal claims that could be brought against them, either by the recipient of the email, or by third parties."

– Vonsturmerringer Lawyers & Notary Public

Breach of confidentiality

By including a disclaimer that tells the recipient that certain content of the email is confidential; you can help protect your organization against the exposure of confidential information. If the receiver breaches this confidentiality, they could be liable.

Accidental breach of confidentiality

If an employee were to receive a confidential email from someone and accidentally forward it to an unauthorised person, the employee and, therefore, the organization could be held liable. For instance, this can happen if a wrongly addressed email is forwarded to a postmaster, who might not be authorised to read the email. If you include a notice in your email stating that it is only intended for the original addressee and that if anyone receives the email by mistake they are bound to confidentiality, this could protect you.

Transmission of viruses

If an employee sends or forwards an email that contains a virus, your organization can be sued and be liable for the damages the virus has caused. Apart from implementing a good virus checker that blocks viruses entering and leaving the organization via email, you can also warn in your disclaimer that the email could possibly contain viruses and that the receiver is responsible for checking and deleting viruses.

Entering into contracts

Written communication, including emails, can be used to form binding legal contracts if the individuals have actual or apparent authority to do so. If you do not wish certain employees to be able to form binding contracts by email, you could include a statement that any form of contract needs to be confirmed by the person's manager.

Negligent misstatement

By law, a person is obliged to take care when giving advice that a third party relies on. If an employee were to give professional advice in an email, the organization could be liable for the effect of the advice that the recipient, or even third party, reasonably relies upon. A suitable disclaimer could protect your organization from this kind of liability.

Employer's liability

Although an organization is ultimately responsible for the actions of its employees, including the content of any emails they send, a disclaimer can reduce the liability. If an organization can show that it has correctly instructed its employees not to send offensive, obscene or defamatory statements, this could help in disclaiming responsibility if an employee breaches these rules. An organization can demonstrate this by including an email disclaimer to that effect and by implementing an email policy that clearly warns employees against such misuse. However, there is no disclaimer that can protect against actual offensive, obscene or defamatory content. The most a disclaimer can accomplish in this respect is to reduce the responsibility of the organization, since it can prove that the organization has acted responsibly and done everything in its power to stop employees from committing these offenses.

Are Email Disclaimers required?

Not always, but they're highly recommended in most situations. However, new and existing regulations are forcing companies and organizations to protect their client's privacy. It's imperative for your company to comply with the appropriate regulations. Several key regulations are as follows.

USA regulations

In the United States, the Health Insurance Portability and Accountability Act (HIPAA) requires health care institutions to keep a record of their email communications and secure confidentiality of information. The U.S. Securities and Exchange Commission (SEC) and Gramm-Leach-Bliley Act (GLBA) impose similar duties on financial institutions. Steep penalties can apply to those organizations that do not comply with their industry's regulations. Therefore, in these industries, organizations are actually required to add disclaimers to their emails in order to protect the integrity of their patients or clients and to avoid any confidentiality breaches.

In the new Internal Revenue Service (IRS) regulation Circular 230, the IRS requires tax advisors to add an email disclaimer to any emails including tax advice, expressly stating that the opinion cannot be relied upon for penalty purposes. The disclaimer must be near the top of an opinion in a typeface the same size or larger than the typeface of the tax advice.

Canada regulations

The Canadian Anti-Spam Legislation (CASL) will take effect on July 1, 2014. This legislation will be rolled out in phases; businesses have a three year transition period to comply. Most of the legislation involves 'opt-in' rules but it also requires each message to include the mailing address, and either phone, email or web address; and include an unsubscribe feature. The maximum penalty is \$10 million per violation.

EU regulations

In 2007 the European Union introduced a directive called "EU Directive 2003/58/EC", which concerned emails sent by companies as part of their business operations. In accordance with previous legislation the regulations that applied to written correspondence by letter or fax was extended to business emails and other electronic communication. The directive requires that all business emails must include: the company's registration number; the place of registration; and the registered office address. Each Member State was required to bring these laws into force before 31 December 2006. Several key countries' adoptions of the directive are:

UK regulations

If your business is a private or public limited company or a Limited Liability Partnership, the Companies Act 1985 requires all of your business emails (and your letterhead and order forms) to clearly include the following details: the company's registered name (e.g. XYZ Ltd); the company's registration number; place of registration (e.g. Scotland or England & Wales); and its registered office address. This information should also appear on your company's website.

Enforcement of the mandatory information requirement is the responsibility of Trading Standards. The maximum fine for non-compliance is currently £1,000. An additional daily fine of up to £300 per

day can be imposed for any continuing breach. And no, you can't just provide a link to this information on your email disclaimer.

If the disclosure of the content of an email becomes the subject of a dispute, it can be argued before a court that the recipient should have known to not disclose the information. However, there is no legal authority for this and the ruling will depend on the court. What you attempt to disclaim will depend on the nature of your business, if your disclaimer is too wide it won't stand up in court.

Ireland regulations

The Minister for Enterprise, Trade & Employment has implemented the EU directive into legislation with effect from 1 April 2007. The particulars which must be displayed by a company on its electronic communications include: the name of the company; place of registration; registered number; registered office; the fact that the company is limited if it is exempt from the obligation to include this word in its name; the fact that it is being wound up if that is the case; any reference to share capital of the company must be to paid-up share capital. Failure to display the requisite information will constitute a criminal offence subject to a maximum fine of €2,000.

Germany regulations

Germany has implemented the EU directive as of 1 January 2007. The required particulars a company must provide for all electronic communications include: the company's registered name; its office location; court register; registration number; and the name of the managing director and the board of directors. Failure to include these details will subject the company to a maximum fine of €5,000. Privacy statements intended to act unilaterally, confidentiality disclaimers, and liability disclaimers have no legal standing under German law.

France regulations

As of 9 May 2007, all companies registered in France must state, in all electronic communication, the following: Company name; registration number; registry location; registered office; whether the company is the object of insolvency proceedings; if the body corporate is a commercial company having its registered office overseas, its name, legal form, address of its registered office, its registration number in the relevant country and, if appropriate, whether it is subject to insolvency proceedings; and, if appropriate, the fact that the company is run by a lease manager or an authorized management agent. Any infringement of the above-mentioned duties is subject to a fine of €750 per infringement.

Italy regulations

Italian law dictates companies must include the following in all electronic business communications: Company registered name; company registration number; place of registration; registered office address; and, if applicable, must clearly indicate if the company is being wound up and going into liquidation.

Netherlands regulations

There is a Dutch law that requires every company to display their CoC number on all outgoing letters, orders, invoices, quotes and other written communications (this includes email).

Failure to follow this law is an economic crime which can result in a fine of up to €16,750 or up to six months imprisonment.

Denmark regulations

As of 4 May 2006, all companies are required to include their name, location and Central Business Register (CVR) number. This law applies to all companies and private limited companies.

Conclusion

With every country enforcing different laws and every court having a different opinion; email disclaimers can only truly be viewed on a case-by-case basis. Best practise in any situation is to have your own legal representatives create a disclaimer specific to your case and then strictly enforce it across your organisation. With email disclaimer legality such a grey area, it's necessary to cover all your bases.

How can Crossware Mail Signature help?

Crossware Mail Signature can provide your company with tamper-proof, enterprise-wide disclaimers to ensure compliancy. Within minutes of installing, you can specify a standard email disclaimer message to be appended to all emails, or limit the message to external/outbound messages. You can also append certain disclaimers based on the department, country or legal entity of the sender.

Crossware Mail Signature works seamlessly as part of your IBM Domino or Microsoft Exchange server. Simply install the application on your existing email servers, and you can be assured that all messages have the appropriate disclaimer appended. Unlike other products that are on the market, our software inserts the disclaimer at the appropriate point in the email; in the case of forwarded or reply-to messages, immediately below the most recently typed text.

With the solution working on the server, all email signatures and disclaimers even from mobile devices become tamper-proof as the typical email user is unable to modify the defined disclaimer – offering companies peace-of-mind when it comes to email compliance.

To find out more information about Crossware Mail Signature, please visit www.crossware.co.nz

To try Crossware Mail Signature for free, please visit

<http://www.crossware.co.nz/cmsdownloadtrial/>

Sources

<http://legallad.quickanddirtytips.com>

<http://www.techsoup.org>

<http://www.out-law.com>

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