

DON'T GET CAUGHT WITH A SMOKING GUN IN EMPLOYMENT CASES: ASK MANAGERS TO BE HONEST AND THOUGHTFUL WHEN GIVING EVALUATIONS OF EMPLOYEES

Publication
Mar 27, 2009

Every employment lawyer defending an unlawful termination case has lived through the nightmare of coming across a “smoking gun” while leafing through the client company’s documents: a document that the lawyer didn’t know about and one that the company’s management didn’t realize would come back and haunt them. Unfortunately, it will now need to be turned over to the plaintiff’s counsel, who is sure to make a good use of it. So how can you prevent this nightmare from happening? What are the most common smoking guns that trip up employers?

- E-mails and instant messages - it’s important to train your managers to remember that all of their e-mails and IMs will be public knowledge should an employment lawsuit arise.
- Evaluation - you must train your managers to be honest and thoughtful when completing employee evaluations, since they will always be examined with a close eye by a worker’s attorney after termination.
- Metadata - if one of your supervisors claims to have created contemporaneous notes explaining the shortcomings of an employee well in advance of termination, you might want to be sure that the document was actually created only after a lawsuit was filed.
- Managers’ files - many supervisors don’t understand that documents they keep about an employee in their own “manager’s file” will still have to be produced in litigation.

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- Medical records - you'll want to audit your record-keeping practices to ensure that non-compliant medical records are kept in a separate filing cabinet under lock and key.
- I-9 forms - employers only need to retain I-9 forms for three years from the original date of hire, or one year from the date of termination, whichever is later in time. It's a good practice to establish routine document destruction for these forms.

This article appeared in the March 27, 2009 issue of [*The Portland Business Journal*](#).