



E-Mails, Memos, and Other Smoking Guns

Insights

3.01.09

(Labor Letter, March 2009)

Hopefully, nothing in this article about the dangers of e-mails, memorandums, etc. will be news to you. You may even say to yourself "Who didn't know that?" Well, apparently some folks "forget" from time to time that information in e-mails, memorandums, and other documents is discoverable in litigation and may be the basis for large amounts of money changing hands. The information in them may or may not convey the author's actual beliefs or motivations – but it may be a jury who decides.

Tales From The Crypt

By way of example, a company undergoing a recent reorganization asked its managers to evaluate employees being considered in the reduction in force. In response, one manager wrote in an e-mail that one of her employees was not performing as well as others because that employee was older and had health problems. The e-mail went on to note that the younger employees had more energy and production.

Upon further inquiry, the manager defended her recommendation of this person for layoff by noting that she told this employee during her last performance evaluation that she, the manager, had concerns that the employee's health and age were issues and affecting her performance. The manager even wrote words to that effect in the evaluation – which also is discoverable.

In another situation, managers evaluating employees for potential layoff made a number of comments in writing that could be interpreted as establishing discriminatory intent. Issues such as race, sex, and age were discussed prominently in the written evaluations and employee comparisons.

A Few Simple Reminders

Remember that when litigation is threatened, you have a duty to preserve information whether stored electronically or in hard copy. Also keep in mind that even deleted e-mails may be recovered from the company's server, and that recipients may have printed copies of these e-mails. "Smoking gun" e-mails often are the centerpiece of harassment claims but may be equally damaging in other cases.

Train all your managers that before sending any e-mail, especially those concerning employees, they should consider whether they would want the e-mail read on television (or in court) or printed in

the newspaper. Recently politicians from two major cities found themselves in trouble based on information contained in e-mails sent to and received by them.

The lesson (or reminder) is that when evaluating, or even discussing, employees for any reason, your managers should be aware that their words may not break their bones, but they can hurt them and your company. Take a few minutes today to remind your managers and supervisors to be careful in their written communications.

Related People



Tillman Y. Coffey
Partner
404.240.4222
[Email](#)