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# LABOR AND EMPLOYMENT LAW UPDATE

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## **SILENT BUT DEADLY: INAPPROPRIATE E-MAILS IN THE WORKPLACE**

A secretary complains of receiving spam at work with sexually explicit content. A sales associate receives a racist joke via e-mail from a customer which he forwards to co-workers. A group of employees debate via e-mail the sexual orientation of a new hire. These are only a few examples of the types of troublesome situations regularly faced by employers in the age of electronic mail.

The significant legal risk presented by an inappropriate e-mail was confirmed in a 2006 survey by the American Management Association. The survey found that (1) 15% of all companies have faced a lawsuit triggered by an employee e-mail, and (2) 24% of employers have had an employee e-mail subpoenaed by courts or regulators. The survey recognized that an employer can be exposed to significant liability for an ill-advised e-mail.

**LIABILITY FOR HARASSMENT:** The contents of inappropriate e-mails can, without more, be the basis for a legal claim under employment discrimination laws which prohibit harassment based upon a protected characteristic, status or activity.

**EXAMPLE:** Chevron agreed to pay four women \$2.2 million to settle a harassment suit based upon the distribution of sexually offensive e-mails, including one entitled "25 Reasons Why Beer is Better than Women."

**EVIDENCE OF UNLAWFUL CONDUCT:** Inappropriate e-mails can also be relied upon as probative evidence in suits alleging violations of applicable labor and employment laws.

**EXAMPLE:** In a suit by a female employee against Microsoft alleging sex discrimination in a supervisor's promotion decision, a New York court admitted into evidence e-mails in which the supervisor (1) referred to himself as the "president of the amateur gynecology club", (2) referred to a woman in the office as the "spandex queen"; and (3) forwarded a parody of a play entitled "A Girl's Guide to Condoms" to a male co-worker, who later forwarded the e-mail to the plaintiff.

**EXAMPLE:** In a reverse discrimination suit brought against Bax Global by a Caucasian employee who alleged that he was terminated because he was not Hispanic, e-mail evidence included (1) a statement that the employee's removal would inspire confidence in the company's Latin American sector, and (2) concerns about the appearance of naming a Hispanic replacement only a day after the Caucasian employee's scheduled termination. A Florida jury awarded the plaintiff \$500,000 in compensatory damages and \$1 million in punitive damages.

**DEFAMATION AND INVASION OF PRIVACY:** As with any means for the transmission of substantive information, e-mails can be the basis for costly defamation and invasion of privacy claims by current or former employees.

**EXAMPLE:** A former employee sued New York Life for defamation based upon an e-mail forwarded to 16 employees stating that the employee had been fired for using "her corporate American Express card in a way which the company was defrauded." A New York jury awarded the former employee \$250,000 in compensatory damages and \$1 million in punitive damages.

**SPOILIATION:** Sanctions for the destruction or concealment of an inappropriate e-mail can present an even greater legal risk for employers. Permissible sanctions include (1) a default judgment in favor of a plaintiff, (2) an instruction to the jury which allows them to presume that an e-mail would have been detrimental to the employer's defense, and (3) an award of attorney's fees and costs to a plaintiff.

**EXAMPLE:** A New York jury awarded \$9 million in compensatory damages and \$20 million in punitive damages to a single plaintiff in a gender discrimination claim against UBS Warburg. Instrumental to the verdict was a jury instruction which allowed the jury to infer that relevant e-mails which had been deleted by UBS would have been unfavorable to the company.

**RECOMMENDATIONS FOR EMPLOYERS:** To avoid the legal pitfalls associated with inappropriate e-mails and spoliation sanctions, employers who provide e-mail access to their employees should implement policies and procedures which address the following:

- \* The reporting and reduction of unwanted spam.
- \* The retention of e-mails for specified periods of time and until the end of threatened and ongoing litigation.
- \* The destruction of e-mails after the expiration of the applicable retention period.
- \* Prohibited workplace conduct, such as harassment, threats and intimidation, gossip, and false statements, in all forms, including e-mails.
- \* The education of supervisors and employees regarding the potentially explosive nature of e-mails.
- \* Notice and consent measures which eliminate any expectation of privacy of employees to information stored or accessed through the employer's computers, including e-mails.
- \* The enforcement of workplace rules applicable to e-mails through reporting and monitoring.

**NOVEMBER 3, 2006:** Robert G. Chadwick, Jr. will be a featured speaker at "Wage and Hour Claims: A Practical Guide to Claim Resolution", a Dallas seminar sponsored by the National Business Institute.

**DECEMBER 2006:** Campbell & LeBoeuf, P.C. will be relocating its office to the following address: 4201 Spring Valley Road, Suite 1250, Dallas, Texas 75206. The firm telephone number will not change.

## DISCLAIMER

This paper is not intended to provide legal advice in general or with respect to any particular factual scenario. Any such advice should be obtained directly from retained legal counsel.

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