

Dallas | Houston | Austin



**End-of-Year
Labor and Employment Breakfast
Seminar**

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Electronic Communications

A Double-Edged Sword

In 2012, the number of business emails sent and received per day totaled 89 billion. This figure has grown at an average annual rate of 13% and is expected to reach over 143 billion by year-end 2016.

THE RADICATI GROUP, INC.

The paradox of email. . . .

THE GOOD



THE BAD



THE UGLY





- A fast and effective way to communicate
- Creates a reference point/tool
- Easy and inexpensive to use
- Allows quick and efficient collaboration
- An easy way for an employer to document and create a record of events



Example:

- Former employee's retaliation claim dismissed based on e-mail record.

Take Aways:

- Good method of documenting workplace events and issues.
- Proof of communication by supervisor of reprimand or correction action taken.



- Somewhat anonymous way to communicate
- Misunderstandings are commonplace
- Overload
- The "Reply All" button
- Auto-fill of email addresses
- "Delete" does not mean deleted



Example:

- Kentucky government retirees victims of Walgreens' data breach
- TSA security leak
- Zyprexa leak – Lawyer error



- Veil of anonymity
- "Knee-jerk" reaction e-mails
- The metadata trap
- Spoliation issue



Example:

- The Dewey & LeBoeuf Debacle:

"When the leaders running law firm Dewey & LeBoeuf LLP realized in the depths of the financial crisis that they were about to violate the terms of their bank loan, they took the easy way out and cooked the books, prosecutors allege."

The Wall Street Journal, March 6, 2014



Emails among D&L lawyers revealed the scheme . . .

- Sanders, writing to DiCarmine about an accounting adjustment:
"We came up with a big one. Reclass the disbursements."
- DiCarmine's response, in pertinent part:
"You always do in the last hours. That's why we get the extra 10 or 20% bonus. Tell [your wife], stick with me! We'll buy a ski house next. Just need to keep the ship afloat."



Emails among D&L lawyers revealed the scheme . . .

- Warren, responding to an email about the "master plan":

"Hey man, I don't know where you come up with some of this stuff, but you saved the day. It's been a rough year but it's been damn good. Nice work dude. Let's get paid!"

- Sanders, writing to an employee about the loss of an accounting partner conducting D&L's audit:

"Can you find another clueless auditor for next year?"



The 2009 HITECH Act:

- Increased fines for compliance failures (disclosure reporting, privacy monitoring, limitations on uses of medical information for marketing purposes and patient access)
 - \$1,000 to \$50,000 per violation
- Fines as high as \$1.5 million for repeated violations



Be Careful About Content:

- Don't use slang.
- Don't assume the reader will know your "tone."
- Don't include anything in a written communication that you wouldn't be willing to tell your grandmother.
- Don't include anything in a written communication that you don't want published to the world.
- Don't include anything in a written communication that you aren't prepared to testify to or about under oath.



Other Recommendations/Best Practices:

- Remember that the things you put in writing won't go away.
 - Remind your business people that "Delete" doesn't necessarily mean deleted!
- Don't use emails to have a run-of-the-mill conversation.
- **STOP** and re-read every email before hitting "SEND."
- Use "Reply All" sparingly (if ever), or at least understand who "All" is!
- Watch for auto-fill on addresses.



Other Recommendations/Best Practices:

- Don't send confidential information via email without encryption.
- **Make sure you and your business people understand the importance of litigation hold directives!**
 - Litigation hold applies to all documents and forms of communication – even text messages, instant messages, etc.
- If you have any reason to believe that an email will be important to a workplace issue, save it.
- Be careful with blogs and social media.



Protecting the Attorney-Client Privilege in Communications:

- One critical element of the attorney-client privilege is that the communication be made under conditions of confidentiality!
- Beware of “Reply All,” auto-complete, firing off emails on a mobile device without re-reading/double-checking, social media posts, etc.
- Possible consequences are waiver of privilege, disclosure to the wrong people, ethical violations and/or malpractice, civil lawsuits and damages.



A Basic Understanding of Metadata:

- Generally speaking, metadata is the DNA that makes up an electronic document.
- Some is visible, some is not.



Metadata – What We See:

- To
- From
- CC
- BCC
- Date
- Subject
- Sender
- Received
- Message-ID
- References
- Resent
- Return-Path
- Time/Date
- Encrypted
- In-Reply-To



Metadata – What We Don't See (which can hurt us!)

- BCC
- Changes made (track changes)
- Details regarding attachments
- Details regarding creation dates/edit dates and times
- Details regarding manner in which information was accessed
- Details regarding review dates and times



Metadata Examples:

- Employee fabricated email in wrongful termination case
- Internal memo regarding termination plans rebutted employee's retaliation claim



Ethical Considerations:

- "Scrub" metadata when sending documents if necessary and appropriate to protect confidentiality. . . .
- But know that metadata can be discoverable, and permanently deleting it can be considered spoliation.



Destruction, Deletion & Spoliation



Definition of Spoliation:

- *Intentional or negligent withholding, hiding, altering, or destroying of evidence relevant to a legal proceeding.*



Potential Consequences of Spoliation:

- A discovery dispute that costs your company significant time, money and effort to resolve.
- Under certain circumstances, if spoliation is found, the court will instruct the jury that it may consider the missing piece of evidence to be unfavorable to the spoliator (even if it wasn't actually unfavorable!).



- To avoid this result, if you are told to preserve emails, or if you reasonably think that emails or other electronic information could be relevant to an issue that is raised, do not alter, destroy, delete or otherwise change the email or electronic communication!
- Communicate the importance of this approach to employees in your company!



Recent Cases on Spoliation:

- *Brookshire Bros., Ltd. v. Aldridge*, No. 10-0846, ___ S.W. 3d ___, 2014 WL 2994435 (Tex. 2014)
- *Brown v. Tellermate Holdings, Ltd.*, No. 2:11-cv-1122, 2014 WL 2987051 (S.D. Ohio July 1, 2014)
- *T&E Investment Group, LLC v. Faulkner*, Nos. 11-CV-0724-P, 3:11-CV-1558-P, 2014 WL 550596 (N.D. Tex. Feb. 12, 2014)



Internal Investigations

Chasing the Unknown

WHAT IS AN INTERNAL INVESTIGATION?

- An internal investigation is a technique for responding to employment disputes that assures compliance with the law, regulatory statutes and the Company's internal policies and procedures.
- An internal investigation is a critical tool in determining what events took place to enable the Company to take appropriate actions to rectify a wrong or to defend itself in a potential lawsuit.



BENEFITS OF AN INTERNAL INVESTIGATION

- Facts are revealed
- Allows the Company to address and stop improper conduct
- Memorializes the Company's good faith response to a complaint
- Potentially insulates/mitigates against liability
- Promotes ethical behavior



TYPES OF INTERNAL INVESTIGATIONS

- Employee disputes
- Employee misconduct
- Whistleblower complaints
- Discrimination allegations
- Sexual harassment/hostile work environment complaints
- Health and safety concerns
- OSHA investigations
- INS Investigations



- *Act as quickly as possible to respond when a problem is discovered/complaint is made*
- Determine whether an investigation is needed
- Determine if immediate action is necessary pending an investigation
- Ultimate decision
- Subsequent remedial measures



IDENTIFY THE INVESTIGATION LEAD

- Subject matter of the allegations being investigated
- Seriousness/consequences of the allegation
- Knowledge of the company
- Resources
- Expertise
- Costs
- Must consider who will be a *credible, ultimate decision-maker*

**STEP
1**

DETERMINE THE SCOPE OF THE INVESTIGATION

- Investigate the allegation – who, what where when why and how
- Identify the time frame
- Identify the key individuals involved
- Locate sources of potential evidence
- Choose a second credible, non-interested person to attend interviews with the lead investigator
 - Don't do an interview alone!

**STEP
2**

- Overview of the allegations
- Timeline/chronology
- Sources of information
- Timetable for gathering and reviewing records
- Identify key players
- Communication plan

**STEP
3**



- Get started ASAP
- Preserve rather than alter or destroy
- Examples of documents to review
- Company rules, policies and procedures
- Memoranda or notes regarding incident/allegations
- Time cards, logs, diaries
- Expense reports
- Communications (email, texts, etc.)
- Prior complaints
- Manager notes
- Personnel files



**STEP
4**

- Identify and keep separate file with copies of any key documents
- Make sure to keep the documents, good or bad!

**STEP
4**



- Meet with the Complaining Party to get all the allegations and their story
- Keep questions open ended but be sure to get all details possible
- Witnesses
- Details of events
- Sources of evidence (i.e. email, texts . . .)

STEP
5



- Ask if there is anything else
- Tell them to come back immediately if there are other problems (retaliation)
- Close by explaining that this is the start of an internal investigation and you will meet with the person again at the conclusion
- Explain that you would appreciate confidentiality so a fair investigation can be done (Do not threaten to take action if they do disclose)
- Consider getting a written statement from them

STEP
5



- Inform them that a complaint has been made involving their actions
- Ask open ended questions about incident
- Ask about specific details of allegations
- Ask if they have any evidence showing what did or did not happen
- Ask if they know anyone who might have witnessed the alleged events

**STEP
6**

- Ask if there is anything else they can add
- Tell that the company will not tolerate any form of retaliation against anyone involved
- Close by explaining that this is the start of an internal investigation and you will meet with the person again at the conclusion
- Explain that you would appreciate confidentiality so a fair investigation can be done (Do not threaten to take action if they do disclose)
- Consider getting a written statement from them

**STEP
6**



- Prepare an interview outline to use with witnesses
- Determine the best order for the interviews
- Document the witness interviews – Written Statements?
- Keep all questions open ended
- Be sure to cover all specific topics alleged
- Clarify dates, times, participants
- Get them to suggest other witnesses or evidence that should be considered
- Do not express opinions or conclusions



**STEP
7**

- Keep an open mind
- Stay on the subject but if other problems surface be sure to take those and decide if investigation is necessary
- Active listening
- Tell them to come back immediately if there are other problems (retaliation)
- Close by explaining that this is the start of an internal investigation and you will meet with the person again at the conclusion
- Explain that you would appreciate confidentiality so a fair investigation can be done (Do not threaten to take action if they do disclose)

**STEP
7**

- Once you have reviewed all the evidence and interviewed the complaining party, the alleged actor, and all witnesses
- Evaluate the evidence
- Make credibility determinations based on the evidence
- Make factual conclusions
- Decide if misconduct occurred
- Decide action appropriate to ensure no future misconduct



STEP
8

Meet with Alleged Actor

- Inform them that the investigation has been concluded and your conclusions about their conduct
- If necessary, take the appropriate action to address the findings (warning, final warning, termination . . .)
- Explain that if any further incidents or issues arise, that there will be further and more severe consequences (if not a termination)
- Encourage the person to come back to you immediately if problems arise

**STEP
9**



Meet with Complaining Party

- Inform them that the investigation has been concluded
- Show appreciation for bring issue to the Company's attention
- Explain that if any further incidents or issues arise, to come back

**STEP
9**

Meet with Complaining Party

- When they try to get details from you, explain that the investigation was done and steps were taken to address issues disclosed, but to protect everyone's interest you are not going to discuss the details of the findings or actions taken
- Explain the need for confidentiality
- Again, encourage the person to return immediately if any other problems arise or if they feel subject to retaliation

**STEP
9**

Lying is not uncommon

- The average person lies to 34% of the people with whom they interact in a week
- Especially true when someone believes a serious consequence may follow if they don't
- "Deceiving others is an essential part of everyday social interaction" – Albert Vrij, 2000
- Average person lies 13 times per week
- 83% of people would lie to get or keep a job



Detecting Lies

- What is told to you does not match what other credible sources say
- Tense and high pitches voice
- Repeats questions before answering
- Lack of eye contact
- Unnecessarily defensive





Holiday Cheer

'Tis the Season for Employment Issues

Party, Party, Party

- It's not all the same
- Time to drink up
- To gift or not to gift
- To pay or not to pay



Employers cannot treat employees of different religions differently

- Christmas, Hanukkah, Kwanzaa
- Nature of Activities?
- Accommodations?



Alcohol and other legal issues

- DUI and Dram Shop Liability
- Sexual and other harassment
- Setting standards for future behavior



Are raffle tickets and holiday gifts taxable?

- Per the IRS: a de minimis benefit is one for which, considering its value and the frequency with which it is provided, is so small as to make accounting for it unreasonable or impractical
- De minimis benefits include holiday gifts but never include cash gifts or gift cards. Such gifts must be reported as wages



Employees may have to be paid for their time at the holiday party

- Required attendance?
- Are clients in attendance?
- Where is the party?
- When is the party?



CELEBRATION TIPS

- Managers set the standards
- Avoid hard liquor
- Moderation, food and oversight
- Transportation



THANK YOU



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