Before You Hit Send – The Perils of Email

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Louis L. Chodoff
chodoffl@ballardspahr.com
856.761.3436

Your Presenter

Louis L. Chodoff, Esquire
Partner, Ballard Spahr LLP
Labor & Employment Group

It’s Out There
Why Talk About E-mails?

They Are Everywhere

- In 2011, the average corporate employee sent and received 105 e-mails a day.
- The total number of world wide email accounts is expected to increase from 3.3 billion accounts in 2012 to over 4.3 billion accounts by year-end 2016.
- In 2012, the number of business emails sent and received per day total 89 billion, compared to 59 billion consumer e-mails sent and received per day.


- The numbers have continued to increase; in 2013 over 100 billion business emails were sent and received per day.


They Affect Your Employees

- 50% of employees have sent or received emails that include jokes, stories or pictures of a “questionable” nature.
- 6% of employees have emailed confidential company information to people they shouldn't have.
- Although 92% of employees said they had never sent an email that put their company at risk, 68% in fact had.
- More than 25% of companies in a recent survey have fired an employee for email misuse; most of the terminations were for inappropriate or offensive language and violation of company rules.

Lisa Guerin, “Smart Policies for Workplace Technologies.”
They Affect Your Bottom Line

- 24% of employers have had e-mail subpoenaed by courts and regulators and another 15% have battled workplace lawsuits triggered by employee e-mail
- 66% of employers monitor internet connections
- 65% block connections to inappropriate websites
- 43% monitor e-mail. Of the 43% of companies that monitor e-mail, 73% use technology tools to automatically monitor e-mail and 40% assign an individual to manually read and review e-mail.


Email Common Mistakes/Problems

- Informality
- Autofill
  - Misdirected emails
  - Consider disabling autofill function
- Reply All
  - Horror Stories!
  - BCC’s
- “Smoking Gun” potential
- Unintended Consequences of Email
  - PA Judges

Misdirected E-mail: The Skadden Summer

“I’m busy doing jack—— Went to a nice 2 hr sushi lunch today at Sushi Zen. Nice place. Spent the rest of the day typing emails and bull——ing with people. Unfortunately, I actually have work to do – I’m on some corp finance deal, under the global head of corp finance, which means I should really peruse these materials and not be a f---up.”

So yeah, Corporate Love hasn’t worn off yet . . . But just give me time.”

J.K. Summer Associate

Skadden, Arps, Slate, Meagher & Flom, LLP

Mistakenly sent by Harvard grad to 20 partners and reprinted as an “Oops” in *The New Yorker*
Misdirected Email – Real World Example #1

- Email sent by opposing counsel:
  - “[Partner], Jessica, Judge Suter’s clerk, called and told me the Judge (sua sponte) adjourned the injunction and discovery motions to next Friday at 11 a.m.”
- Reply mistakenly sent by partner to opposing counsel instead of client:
  - “This is total BS.”

Smoking Guns: DLA Piper

- DLA Piper sued a client for non-payment of a bill. The client counterclaimed against the law firm for overbilling him.
- During the course of discovery, the following e-mails between DLA Piper attorneys was uncovered.
Smoking Guns:
FROM THE WALL STREET JOURNAL (July 7, 2010):
From: Chad Gifford, then-Chairman of Bank of America
To: Thomas May, then-Director, Bank of America
Date: 16 January 2009
Subject: Re.
"Unfortunately it’s screw the shareholders!"

From: Thomas May
To: Chad Gifford
Subject: Re:Re.
"No trail."

As BAC prepared to disclose another series of bleak write-downs after the Merrill merger, director Chad Gifford’s charming “screw the shareholders!” email met with an admonishing reply from Thomas May. Basically, he told Gifford to make sure there would be no paper trail of embarrassing or damning emails. Emails that say, for instance: “screw the shareholders!” Or emails that say, destroy this paper trail.

Unintended Consequences of E-Discovery

• “Pennsylvania Porn Scandal Prompts 2 Top State Officials to Resign.”
• “Judge Among Those Involved in Pa. Porn-Email Scandal.”
• “Schools Boss Sacked Over Explicit Emails”
• “Kane Says She Will Publicly Release Porn Emails.”

Unintended Consequences of E-Discovery

• Justice Eakin Suspected Over Offensive Emails
  - Justice J. Michael Eakin of the Pennsylvania Supreme Court was suspended from his job on Tuesday as he faces ethics charges over allegations that he brought his judicial office into disrepute by sending lewd jokes and other offensive material through his personal email.
  - A number of the emails received by Justice Eakin from the golfing group contained pictures of nude women, sexually suggestive themes, violence towards women, homophobic content, racial humor and stereotypes of religious groups, among other offensive material.
The Golden Rule

“Never write when you can talk. Never talk when you can nod. And never put anything in an e-mail.”

Eliot Spitzer
Nov. 28, 2005
CNNmoney.com

When “Pieces of Junk” Become Pieces of Evidence: Spotting the Issues

Potential E-Mail Troubles

• E-harassment
• Discrimination
• Employee theft of sensitive or confidential information
• Invasion of privacy claims
• Wage and hour issues
E-Harassment

- Sending threatening, unsolicited, or sexually explicit messages to others by e-mail is a form of harassment, as is continuing to e-mail someone who has asked you to stop.
- E-mails can be traced back to the computer from which they were originally sent, so it is important to be careful in what you send.
- Do not send anything that could be offensive to anyone. Many lawsuits have come from people sending “innocent” jokes to their co-workers and offending one or more of them.

FROM A RECENT LA TIMES ARTICLE

- Sony Pictures Entertainment Co-Chairman Amy Pascal's announcement that she would step down from her job at the studio came less than two months after thousands of her personal, often controversial emails leaked online.
- A group of hackers self-identifying as the Guardians of Peace sent the contents of Pascal's inbox to the media in December, and many outlets proceeded to publish email exchanges that proved damaging to the executive's reputation.
- Perhaps the most damning reveal was a racially insensitive back-and-forth between Pascal and high-powered producer Scott Rudin.
Unintended Consequences of E-Discovery

- 19 Year Old Female Intern: Yeah I had a feeling that would be the case with you.
  - 49 Year Old Male Politician: :). Good night
- 19 Year Old Female Intern: :) Night babe
  - 49 Year Old Male Politician: 
  - Munich is a cool place
- 19 Year Old Female Intern: That suit and the combo is sexy and you look great. I see a lot of work is happening 😊

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Unintended Consequences of E-Discovery

- 19 Year Old Female Intern: Tell me why 😄
  - 49 Year Old Male Politician: Once I start I don’t stop.
- 19 Year Old Female Intern: Oh good 😄 didn’t seem that way in your office
  - 49 Year Old Male Politician: We need no spies
- 19 Year Old Female Intern: Haha I agree
  - 49 Year Old Male Politician: God I want you right now
- 19 Year Old Female Intern: I wish you could have me right now
  - 49 Year Old Male Politician: Damn. We need lot of time and a quiet room.
- 19 Year Old Female Intern: That sounds amazing
  - 49 Year Old Male Politician: Will have my way with you
- 19 Year Old Female Intern: Soon enough 😄
  - 49 Year Old Male Politician: And leave you quivering

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 Discrimination

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Discrimination – Real World Example #2

From: National Sales Director
To: Human Resources
Re: Open Area Sales Position

Hi Shiela. As you know, we are looking to hire a new area sales manager. The job requires making a lot of group presentations. Guess who applied? FFFred FFFergus!!

From: HR
To: National Sales Director
Re: Open Area Sales Position

They will be llloong ppresentations!

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Discrimination

• A female employee worked in a furniture store and injured her back while moving furniture on the job. After missing several days of work, she received poor performance reviews and was eventually terminated.
• She sued her employer, alleging disability discrimination and retaliation for taking FMLA leave and for filing a workers’ compensation claim.
• The employer’s defense was that the plaintiff was a poor employee.

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Discrimination

• An Illinois court held that negative and derisive e-mails between the injured employee’s supervisor and the human resources department containing various references to the plaintiff’s reduced workload, hospital visits, questions about how she was being paid for missing days, and complaining about her not working due to her injury could be used to prove that the employee was being targeted for termination.


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Discrimination

Examples of Electronic “Sighs”

• Store manager complains to supervisor in an email that plaintiff had gone from working 6 hours per day to requiring hospitalization: “She went from 6 hours a day[] to apparently zero and in the hospital.”

• In another email, store manager expressed his frustration with his employee’s back pain with an electronic “Sigh.” He wrote, “Brenda Green received a call from Brenda Myers today stating that she was told NOT to work due to her back injury. Sigh.”


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Discrimination

• Avoid the electronic “sigh.” If you are discussing another employee involved in a human resource situation (or a confidential business procedure), do this in person or over the phone before the information is emailed.

• “LDL” — “let’s discuss live” — is an acronym that surfaced during the S.E.C.’s investigation of Goldman Sachs for its role in the nation’s financial crisis.

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Real World Example #3

From: Bill Smith (HR)
Sent: Monday, July 09, 2007 4:12 PM
To: Jane Doe (HR)
Subject: Jim Johnson

Hey Jane,

How’s your vacation going? Good I hope, actually I hope so good that you are not even checking blackberry BUT if you happen to be looking at this I spoke with Mary Jones (i.e., the supervisor today, and she wants to terminate Jim Johnson on Friday, she had a conversation with him this morning and she is extremely frustrated that he is continuing the expectation that we continue to work this weekend and she wants him to sign off on the Community Service time on Thursday. The only documentation that Mary has is a few emails about his work performance.

I don’t know if we have enough to support termination or if you have more information that Mary has not shared. If you happen to be reading email can you send me a quick email. I asked Mary if this is an issue that can wait until Monday and she said no.

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Real World Example #3 (continued)

From: Mary Jones
Sent: Tuesday, July 10, 2007 1:17 PM
To: Bill Smith
Cc: Jane Doe
Subject: Jim Johnson

Bill,
Just so you know...the conversation I had with Jim after speaking with Jane was that he had two options:
1. Stay on staff while looking for other opportunities. We would set a timetable.
2. Meet with HR and go through the formal termination process.
So I have set expectations with him that he needs to begin to look for other opportunities. He is definitely not a fit
for the group but want to cover myself here and ensure we are on the same page when we meet with him.
Thanks for your help!
Mary

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Real World Example #4

From: Custodial Manager
To: Personnel Manager
Subject: John Smith

Good Morning:

When I asked for a male to replace the vacancy in our staff, I didn’t mean “A MALE
WITH A LOT OF MEDICAL PROBLEMS.” You sent John Smith. Since the first day
he came he showed me a bunch of doctor notes related to his health, that he has issues
with his legs and so on. He says he can’t lift heavy things, some problems walking, using
stairs. I don’t think we have light duty for custodians.

In other words, Mr. Smith represents an inconvenience for the rest of the night crew
where we have three senior ladies, one of them with a serious medical condition for life.
The bottom line is that we need somebody else that really helps these three ladies.
Thanks.

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Employee theft of sensitive or confidential information

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Confidential Information

- Employees may also use e-mail to harm their employers.
- Documents and other company information are stored easily or converted to electronic form and readily transferred by e-mail.
- Misappropriation of confidential and proprietary information or trade secrets may happen in a matter of seconds, simply by sending an e-mail to a personal account.
- Or an employee may not act with nefarious intent. She may think nothing of attaching a sensitive document to an e-mail that she would never “steal” from the office in hard copy.

Real World Example #5

“Lying is hard”

From: Employee Personal Email Account (sent from her work computer)

Sent: Sun, 7/15/07 3:54 PM
To: Other Personal Email Accounts

At this point the dinner for Tuesday night is still on...We will play it by ear...but if we do go out to eat we can not speak about anything regarding New Employer...NOTHING...

If Bill asks any questions...someone has to immediately change the subject. Pull your top off or something to direct attention to something else. Counting on all of you to improvise.

It is especially important as we move forward that no one knows that I had any knowledge of New Employer. I did know you were dissatisfied and looking etc...but no specifics.

Also as important...There is NO connection between Mike’s team and our team...YOU HAD NO Knowledge of what they were doing.

I know I keep sending you these odd emails but lying is hard and the more we remind ourselves the better we are.

Thanks.

Invasion of Privacy Claims
Invasion of Privacy Claims

- Protect your legitimate business interests in e-mail monitoring with a detailed and clear e-mail policy.
- Explain that the e-mail system, its software and hardware, belongs to the company and is intended for business purposes only during working hours.
- The policy should reserve the right to monitor the use of e-mail at the company’s discretion.
- Clearly state that employees have no expectation of privacy in any e-mails sent or received, saved or deleted, regarding any matter, over the company system.
- Have your employees acknowledge this policy to defend against a claimed expectation of privacy.

Wage and Hour Issues

- PDA’s – use by non-exempt employees on weekends and “off hours.”
E-mail Final Thoughts

- **Bottom line –** Think before you hit send!
  - Ask what is the purpose of the e-mail.
  - If it is not to document or preserve a record for your file, do not send an e-mail.
  - Be professional. If you need to vent, pick up the phone and call a friend.
  - Be wary of the unintended consequences of e-discovery. Ask if you would want your e-mail produced in litigation or shown to a jury.

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