SPECIAL UPDATE

ALL EMPLOYERS - PUBLIC AND PRIVATE - TAKE NOTICE!

March 20, 2014

AS PART OF OUR ONGOING REMINDER

ABOUT THE DANGERS OF EMAIL COMMUNICATIONS

EMAILS: DON'T PUT ANYTHING INCRIMINATING IN THEM!

Four members of the Dewey & LeBoeuf law firm apparently violated their own cardinal rule by sending incriminating emails to each other. The former chairman, executive director, chief financial officer and client relations manager of the firm, were all charged with larceny and securities fraud. The four talked openly in emails about "fake income," "accounting tricks," their ability to fool the firm's "clueless auditor," and even used the phrase "cooking the books" to describe their "Master Plan" to mislead the firm's lenders and creditors. At its peak, the firm had 26 offices and employed more than 1,300 attorneys. The firm filed for bankruptcy in May 2012, and the $550 million in claims against the estate made it the largest filing by a law firm on record.

4 Accused in Law Firm Fraud Ignored a Maxim: Don't Email, The New York Times (March 6, 2014), Mathew Goldstein
http://dealbook.nytimes.com/2014/03/06/former-top-leaders-of-dewey-leboeuf-are-indicted/?_php=true&_type=blogs&_php=true&_type=blogs&_r=1&

From our March 22, 2013 Special Update:

PUBLIC RECORDS ACT: COURT RULES THAT PUBLIC OFFICALS' COMMUNICATIONS VIA PERSONAL ELECTRONIC DEVICES AND EMAIL ACCOUNTS ARE SUBJECT TO DISCLOSURE

A Santa Clara County judge ruled that emails, text messages, and other communications created by San Jose officials about city business are "public records" subject to disclosure under the California Public Records Act ("PRA"), *even if the communications were made through officials' private electronic devices or email accounts.*

The ruling was in response to a PRA request made by a community activist for any communications created or received by city officials (including the Mayor and City Council members) concerning a controversial commercial development deal, including communications from officials' personal, non-city-provided cell phones and email accounts. Although the city argued that emails or text messages stored outside city servers

were not official public records subject to disclosure under PRA, the court rejected this argument, holding instead that a broad array of communications are public records that may be disclosed under PRA.

Under the court's ruling, communications regarding "the public's business" maintained on the private accounts of City officials are subject to disclosure. This could include communications drafted by public officials or even "any record that is "used" by a public agency . . . even if it is not prepared, owned, or retained by the agency." *The court suggested that city officials could not avoid disclosure by conducting city business through private accounts and devices.* Lastly, the court noted that San Jose officials cannot claim a "reasonable expectation of privacy over their communications concerning the public benefit, particularly on topics currently on the City public agenda," and that public entities such as the city may require City Councilmembers and their staff to disclose such communications.

NOTE: While this ruling applied to public employers under California's Public Records Act, *the rationale should still be noticed to private employers*. Emails and text messages are frequently discoverable in litigation. Ill-advised emails have caused employers substantial liability.

ADVICE: (1) Use separate phones, separate lines and separate emails for personal use. Strictly limit your business phones and emails for business use. Strictly limit your personal phone to personal use. In this manner, if your agency receives a similar Public Records Act request for email or text communications about agency business on personal accounts, the agency can truthfully respond there are no responsive documents. (2) Consider revising your personnel policies to strictly limit use of business phones to business use and, precluding business use on personal phones. (This also avoids potential wage/hour issues that can arise regarding off the clock work.); (3) *Don't email or text at all in plain view of the public or employees during work hours or at work activities unless business in nature and necessary or appropriate*. Requests for even private email and text activity occurring on work time may be made.

From our September 2010 Newsletter:

EMAILS – As a regular reminder to employers to be cautious about internal emails given their significance in litigation: In a recent lawsuit by the creator of "Who Wants to be a Millionaire" against Disney for $250,000,000 over alleged failure to share profits, plaintiff presented internal emails from former Disney CEO Michael Eisner admitting awareness that Disney anticipated over $1.1 billion in profits from the show. This contradicted Disney's position at trial that it did not know how much anticipated profits would be at the time they reached profit-sharing agreements with the show's creator. After trial, the jury found against Disney, and awarded the show's creator $269,000,000.00.

From our October 2009 Newsletter:

Wrongful Termination/Age Discrimination – A jury verdict in an employment wrongful termination/age discrimination matter from the Riverside Superior Court in the amount of $25,916,917. Plaintiff was a store manager for Kmart with consistent exceeds expectations evaluations, who was terminated after 20 years on

the job at the age of 64. Plaintiff alleged that after Kmart emerged from bankruptcy and merged with Sears, Kmart embarked on a policy to get rid of older workers, and to employ younger more aggressive (lower paid) managers. Kmart alleged the termination was due to unsatisfactory performance. The award was $916,917 in lost wages and emotional distress, and **$25,000,000 in punitive damages**.

(Hawkins v. Kmart, Riverside County Superior Court, Case No. RIC 462322, LA Daily Journal, Verdicts and Settlements, August 21, 2009, page 4.)

NOTE: An important reminder of **being careful with work emails**, especially on sensitive employment issues, the key piece of evidence in Plaintiff's favor was an email from a Kmart Officer which stated: "Hawkins is 64 years old with 20 years on. I think I can get him to retire. Let me work on him.")