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MORE ON COMMERCIAL/FINANCIAL by NEDA SHAKOORI

How to stay in touch, and stay within legal bounds in the age of BYOD

IN THIS DAY AND AGE, corporate environments are experiencing a constant rise in the exchange of information and ideas via electronic means. While the frequency of such communications is consistently increasing, especially considering many employees now work remotely, so too are the methods in which these communications are exchanged. This free exchange of information can be problematic for companies in the sense that the information exchanged may subject the company to litigation, or may be the subject of ongoing litigation.

With the volume of information exchanged, companies should take great care to educate and inform their employees in regard to the ways within which information can be used. Employees need to be aware of the categories of communications susceptible to use in litigation, as well as the business groups within the company who are more susceptible to litigation. This is best accomplished through employee education and trainings, and implementation of internal communication policies.

With this knowledge, employees can make better decisions as far as the substance of the information they are communicating, as well as the ways within which they are communicating the information.

SUSCEPTIBLE COMMUNICATIONS

Communicating via electronic means is so ingrained in our daily lives that we are often unaware of the various methods with which we communicate. For companies in particular, knowing how employees communicate is critical for purposes of keeping track of and locating those communications when necessary. While email is still the primary method of communicating electronically, employees now also communicate, both within the company and externally, via text message, company intranets and extranets, social media, webinars, and the list goes on. These communications occur via employees' personal devices and through company-issued devices.

Whether on personal devices or company-issued devices, employees should be informed that their communications may be the subject of litigation and, therefore, discoverable. For example, communications on a company extranet between an employee in the supply chain department and a third party distributor may be discoverable in a breach of contract action brought by the distributor. In a separate instance, text message communications between company employees regarding a trade secret may be discoverable in a trade secret misappropriation case. These communications were likely generated without a second thought, but, unfortunately, when used in litigation—in a courtroom before a judge or jury—they may be the evidence necessary to establish an element of a claim. Statements like "we're going to get them" or "I should not have this information, but the competition


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will never know" were likely made with no consideration for the consequences or the potential for the statement as evidence of an element of a claim at trial.

With the vast array of communication and communication platforms available to employees, companies need to have policies and protocols in place. Email policies and social media policies are increasingly more common and employees are required to acknowledge receipt and review of said policies. BYOD or BYOC policies are also more common and particularly critical given the intermingling of personal data and company-owned data. Employees should be informed about the boundaries of information—what data is personal and perhaps not discoverable versus what is owned by the company and subject to discovery in litigation.

WHICH DEPARTMENTS?

Certain business groups within a company may inherently be more prone to litigation than others. For example, a mergers and acquisitions department may be more prone to litigation given the task of contract negotiation and interpretation. These employees may communicate about inclusion or exclusion of particular provisions, customers, or partnerships. These communications could include the reasons why the company is or is not including or excluding certain provisions, customers, or partnerships. There may also be communications interpreting provisions. All of these communications could then be subject to discovery in litigation involving breach of contract or various business torts.

Communications about competitors can involve sensitive conversations about what is best for the company, such as strategies for gaining market share, methods of limiting competitors' access to vital market resources, and poaching of employees. Moreover, communications with competitors can involve conversations about your company's willingness (or lack thereof) to provide assistance, gamesmanship, and incorrect or misleading statements. Again, at the time these statement are made, they may not seem particularly problematic, however, when broadcast in a courtroom, a winking face emoji after the statement "let's make them pay" may not bode well in an action where a company is defending itself against a business tort claim.

While certain business groups may be more prone to litigation, given the informal nature of most electronic communications, any employee is capable of communicating in a way that may have a potentially negative impact. A supervisor in the sales department may make a practice of sending harassing, sexually-explicit texts to a subordinate. This could subject the company to an employment law claim, whereby the texts would be the subject of the claim. Perhaps someone from the product development department communicates via extranet with a supplier, requesting and obtaining confidential competitor-company information later used in a product roadmap. These communications could subject the company to a trade secret misappropriation claim.

SOME SOLUTIONS:

Given the many avenues available for corporate communications to make their way out of the company, and the various legal actions that may be brought in reliance on those communications, companies should raise the issue with employees early and often.

Employees should be advised to bear some considerations in mind when communicating internally and externally. Some of these considerations include: (1) whether the information can be relayed via phone versus email, (2) the language used, (3) the tone of the communication, (4) the amount of information communicated and (5) the potential for the statement to be misinterpreted.

In addition to formal policies and procedures relating to electronic communications, companies should consider having an internal helpline or ombudsperson dedicated to addressing issues within the company. Intra-company department leads should also assist with the process by ensuring the culture of their particular department is one wherein communications are kept above board and in line with company standards.

Employees should also be made aware that their communications and conduct could subject them to termination from the company, irrespective of litigation. For example, if an employee is emailing a source for the purpose of improperly obtaining confidential information from a competitor company and does obtain that information, the employee is likely violating a confidentiality agreement they signed when they were hired. Assuming this conduct is discovered, the emails are clear evidence of the employee's violation and could result in that employee's termination from the company.

These recommendations, while seemingly basic, represent a critical and necessary component of a company's efforts to minimize risk in corporate communications. While not meant to shield wrongdoing, these recommendations are aimed at helping to prevent otherwise innocent and lawful conduct from having a negative impact on a company. ●

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