

# THE INSIDE PERSPECTIVE

LABOR AND EMPLOYMENT LAW SOLUTIONS FOR EXECUTIVES AND HR PROFESSIONALS



SMITH MOORE LLP  
ATTORNEYS AT LAW

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## All Hail E-Mail?

Corporate America lives by e-mail today. Time consuming face-to-face communications have given way to more efficient, almost instantaneous communications at the press of a button. But with ease of communication comes informality, and with informality comes risk.

Consider the e-mail traffic that occurs both before and after significant personnel decisions. When managers use e-mail to "discuss" the strategy for managing a disciplinary or discharge action, they are generating documents that the affected employee—and his or her attorney—may be entitled to see should the matter end in litigation.

Catching up to the ways of modern workplaces, the planned changes in the rules that govern the discovery process in federal lawsuits specifically include this Electronically Stored Information ("ESI"). Now, in all federal court cases, where most discrimination claims are litigated, an employer must be prepared to provide to its opponent all potentially relevant and "reasonably accessible" ESI. State court rules are expected to follow suit.

With e-mails more likely than ever to wind up in court, keep in mind:

- An e-mail is a document, just as a letter or memorandum is a document. Consequently, it may be discoverable in litigation.
- An e-mail is not the spoken word. It does not go away when one presses "delete." You should assume that an e-mail, once typed and sent, is recoverable by anyone motivated to find it.
- Consider e-mail to be the same as any message typed on Company letterhead. A jury may.
- The jokes, bizarre stories, and funny pictures that commonly circulate on e-mail can paint senders and recipients as biased or hostile toward employees in protected categories.
- All employers should address e-mail and other ESI in their written document retention and disposal policy.

# TIP

Human Resources professionals have long recognized that employment litigation may be won or lost based on the strength of the documents supporting the personnel action. Keep in mind that e-mails are considered documents too, and they may be subject to discovery in later litigation.



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The firm restricts its practice in the labor and employment area to the representation of management.



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