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Before You Hit Send...How to Avoid Email Commitments That Can End in Litigation

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It is no surprise that employees of most companies today conduct the bulk of their work-related communications via email, rather than telephonically or in-person. The surprise often rests in the breadth of potential liability resulting from claims made by employees based on representations or perceived promises set forth in such correspondence. To combat potential liability, companies should establish clear electronic communications policies, in particular with respect to hiring, compensating, disciplining, and terminating employees.

Employees and directors routinely use email in connection with their duties. The topics covered in such communications could include employees' level of compensation, job functions and responsibilities, restrictive covenants (such as non-solicit and non-compete arrangements), disposition of company property or assets, and the terms of employee separations. Company representatives who send these emails generally do so with only good intentions, and view their communications as informal and non-binding. Typically, however, their emails fail to state this intention explicitly, such as by qualifying a communication as "for discussion purposes only." If and when negotiations stall, these emails can become the focus of subsequent litigation regarding whether an agreement was reached and, if so, the "agreed upon" terms.

Courts have found that electronic communications may constitute a binding agreement. Recently, the Sixth Circuit Court of Appeals held that agreement in an email without a reservation of rights bound the parties to the terms of a settlement concerning copyright violations (in the case of Remark, LLC v. Adell Broadcasting). In that case, the defendant proposed terms via email and the plaintiff "agreed to all of [the] proposed changes" and asked the defendant to create a final version. Notwithstanding the plaintiff's execution of the final version served by the defendant, the defendant refused to execute the final version and attempted to reopen negotiations. The Court concluded that the defendant's failure to sign the final version of the agreement was immaterial: absent a reservation of rights by the defendant to the final terms proposed and agreed to in an email, there was a binding agreement.

Electronic communications are becoming more relevant in the employment context as well. Take, for example, the case where a CEO of a small company notifies a high-level employee that her services

no longer be necessary. In a subsequent email, the CEO summarizes the severance package being offered, including severance pay for six months, a reduction in the scope of the employee's non-competition restriction, and permission for the employee to retain her company computer, all in exchange for the employee's agreement to sign a release of claims against the company. Before the parties can draft an appropriate severance agreement, however, the CEO discovers that the employee committed an act that constitutes "cause" under her employment agreement. In their email exchanges, however, the CEO never mentioned the employment agreement, never conditioned severance payments on the termination being "without cause," and did not make the offer subject to the execution of a mutually acceptable severance agreement. The employee now believes that final agreement has been reached, and that she is entitled to all of the severance benefits outlined in the CEO's last email, provided only that she sign the release of claims. The employer, meanwhile, believes the parties were merely discussing possible terms, with nothing finalized until a separation agreement had been fully executed. If the parties cannot negotiate a mutually-acceptable outcome, litigation likely will follow.

Lastly, consider another example where a corporate director sends a confirmatory email to a newly hired senior executive stating that "if you are terminated by the Company, then you are entitled to severance equal to one year's base salary." The email fails to (i) condition receipt of such severance on the termination being without "cause," (ii) condition the payment on the executive's execution of a release of all claims, (iii) set out the manner of payment (e.g., lump sum or installments), or (iv) condition the severance on compliance with executive's obligations under his restrictive covenants or agreement to new covenants (e.g., non-disparagement). Even if these issues can be addressed short of litigation, such as when a formal employment agreement is prepared, the board member's email may make it more difficult for the company to expeditiously negotiate an amicable employment agreement with the new executive.

To avoid this kind of dispute, companies should establish formal electronic communications policies covering employees' and directors' use of email correspondence, text messaging, and other social media in a business context. Such policies can be accompanied with steps to educate employees and directors of the risks of creating binding communications via email so that they better appreciate the concerns and avoid common pitfalls. Companies may also wish to implement the use of automatic footers in emails making clear that no communication can form the basis of a binding agreement without the signature of an authorized company representative. In certain cases, where information is particularly sensitive or the stakes are high, executives and board members should consider the use of telephonic or in-person communications instead of via email.

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