

Managing in a Minefield

The Four Key Concepts of Employment Law

One of the risks of being a manager today is getting sued. In 2007, more than 13,000 discrimination cases were filed in federal courts, and nearly 83,000 charges of discrimination were filed with the EEOC. Court statistics show that from 1990 through 2005, employment discrimination case filings in federal court jumped from 8,400 to nearly 19,000, an increase of 133%. And, while a mere 1.5% of all federal civil cases actually go to trial, more than one-third of all federal trials involve civil rights violations, including employment discrimination and harassment.

The costs are enormous. According to a 2008 U.S. Department of Justice study, the median award to employment discrimination plaintiffs was \$175,000, and 1 in 20 cases resulted in a award exceeding \$1,000,000. To those jury awards, add pre-judgment and post-judgment interest and the employee's attorneys' fees. Business Week reported in 2008 on the average costs of legal fees to companies to fight one lawsuit—even if they win:

- \$10,000 after complaint filed
- \$100,000 through summary judgment
- \$175,000 through trial
- \$300,000 on appeal.

In 2000, one fifth of all jury verdicts in employment cases were for \$1 million or more. According to a 1997 study, the average cost of defending an employment lawsuit was close to \$200,000, even if the company won.

Today the trend is toward multi-million dollar verdicts. For example, in 2000 a jury award of \$7.4 million in damages for age discrimination – including \$4.4 million for unrealized stock option appreciation – was upheld on appeal. In 2002, a jury awarded more than \$11 million in damages—including \$900,000 assessed personally against two supervisors—to a man who had been retaliated against for taking time off under the Family Medical Leave Act to care for his aging parents. Class actions, where many similarly-situated employees join together, have involved hundreds of millions of dollars.

Where's the Money?

People sometimes wonder how a denial of promotion could be worth so much money. The law requires juries to award certain types of money damages. For example, if employees win, in almost all cases they must receive *back pay*. Back pay is the amount they would have received if they had not been treated illegally, minus what they actually made in other jobs, up until the date of trial.

Employees who win sometimes also are awarded *front pay*. That's the salary they would have received (including reasonable future pay increases and promotions) from the date of trial until some date in the future. For older employees, say after 50, it's not unusual for front pay calculations to go out to retirement age. Since it is often difficult for employees this age to get comparable jobs, they may be awarded full salary for 10 or 15 years.

Back pay and front pay together are referred to as *actual damages*. Actual damages also include other out-of-pocket expenses such as medical bills, costs due to forced sale of income property and other reasonably foreseeable losses.

In discrimination, privacy and some wrongful termination cases, employees also can win *compensatory damages* for emotional distress. These are designed to compensate the person for pain and suffering, humiliation and embarrassment. In some states, the emotional distress damages must be somewhat comparable to the actual damages. For example, they might be two times or ten times the amount of actual damages. In other states, the jury can pick any number they think is appropriate.

If the jury is allowed to award emotional distress damages, they probably also are allowed to assess *punitive damages*. Punitive damages are designed to punish the company for intentional wrongdoing. They usually are a percentage of the company's net worth, annual income or some other financial measure. The amount may be set by law or may be up to the jury to decide, but the Supreme Court ruled in 2003 that, as a matter of constitutional due process punitive damages cannot be more than nine times the amount of the actual and compensatory damages. Punitive damages are what send verdicts into the millions.

However, unlimited punitive damages are only available in cases brought under state laws that have no damage caps. In discrimination

cases brought under the federal laws prohibiting discrimination, there are limits on compensatory and punitive damages and, if a whistleblower is fired, demoted, or otherwise interfered with, the retaliating manager can be imprisoned for up to ten years. The limits are:

- \$50,000 for employers with 15 to 100 employees,
- \$100,000 for employers with 101 to 200 employees,
- \$200,000 for employers with 201 to 500 employees and
- \$300,000 for employers with more than 500 employees.

In discrimination and some other cases, employees who win also get attorneys' fees to pay their lawyers a reasonable hourly rate.

When you add all of these damages together, you can see how verdicts can be so high.

Federal law allows a supervisor or manager to be held personally liable for:

- withholding overtime pay under the Fair Labor Standards Act;
- violating worker rights under
 - The Family and Medical Leave Act
 - The Equal Pay Act
 - COBRA
 - The Employee Retirement Income Security Act
 - OSHA
 - The Immigration Reform and Control Act;
- conspiracy to violate someone's civil rights.

Under the laws of many states, you could also be personally liable in a lawsuit for:

- slander or libel;
- aiding and abetting a harasser by ignoring complaints;
- intentional interference with someone's contractual rights;
- intentional infliction of emotional distress, if your conduct is truly outrageous;
- false imprisonment, if you force employees to remain in a room against their will;
- conspiracy to violate someone's legal or civil rights.

Criminal Liability

If lawsuits aren't scary enough, every company is subject to random audits and inspections by government entities such as OSHA, the Department of Labor, EEOC or state agencies. Violations can lead to fines, shutdowns or imprisonment. Yes, managers can go to prison for violating some of the laws in this book.

Managers of corporations can be found guilty of crimes under many U.S. and state laws. There is criminal liability for environmental crimes, securities violations and federal contract fraud. Corporations have been held criminally liable for acts by employees that were contrary to "longstanding, well-known and strictly enforced" company policies.

Criminal penalties can be \$500,000 per offense, and can go into the multi-millions. Fighting the government can be much more costly than defending a case brought by one employee.

Hidden Costs of Lawsuits

Whether or not a company wins a lawsuit, there are internal costs when it's sued:

- lost productivity of the people involved: managers, employee-witnesses and top executives,
- lost time of in-house lawyers, personnel department, payroll, benefits and accounting clerks,
- poor reputation with investors, customers, vendors, competitors, business associates and applicants for employment,
- poor morale and gossip among current employees.

Managers also can be sued personally. Some potential costs to you:

- personal attorneys fees,
- lost time, productivity and focus from work,
- stress resulting in medical conditions and doctor's bills,
- strain on marriage and family,
- negative career growth,
- being fired,
- paying fines,
- going to jail.

If you are named personally in a lawsuit, state law may require your company to defend you if you were acting in the course and scope of your employment. For example, as a manager, firing people is part of your job. If you are sued for wrongful termination, the company could be required to represent you.

Sexual harassment, on the other hand, is not part of your job. If you're accused of that, your company might have the right to refuse to defend you.

In addition to acting within the course and scope of your employment, you must be able to show you acted reasonably and in good faith. Even if you made a mistake, if you were just doing your job and tried to do the right thing, the company may be required to represent you.

But if the company finds you acted maliciously, out of personal animosity or hatred, not only does it not have the duty to represent you, but it also could terminate your employment, name you as a cross-defendant or sue you for violation of your duties as an employee.

If a judgment is brought against you, in some cases the company may be able to pay it for you. But if the verdict specifies you are liable individually, you must pay out of your own pocket.

Your homeowner's or general liability insurance policies may cover you in some of these cases. But the best insurance is knowledge of the law.

Why Companies Settle

Most lawsuits don't go to trial. More than 98% of all cases settle or are resolved in pre-trial proceedings. According to one national study, discrimination case settlements nationwide between 1994 and 2000 ranged from a low of \$641 to a high of \$508 million. The median settlement was for \$60,000, but in more than 40% of the cases, the settlement exceeded \$100,000.

If you are sued, but you were completely reasonable and acted within the law — you were right — your company still may choose to settle the case. The company must weigh business factors in addition to legal costs in evaluating whether settlement is less costly than litigation.

Another reason to settle is that the law may change significantly. What was completely legal at the time it was done might be declared illegal later by a court in a similar case. Then it's prudent to settle, rather than risk losing.

Most discrimination and wrongful discharge cases are heard by juries. And jurors – even before they've heard one word of evidence – tend to sympathize with the ex-employee, rather than a corporate employer. According to a 2002 survey commissioned by the *National Law Journal*, 75% of potential jurors think that corporate executives try to cover up the harm done by their companies. Close to 40% of those surveyed believe that if an employee sues for race or sex discrimination, the employee was probably wronged. So, even if you think your company has a good solid case and should win, you may not be able to convince a jury to change their attitudes.

Finally, companies settle to prevent bad publicity. If a case has caught the attention of the media, the industry, your customers, your investors or other key groups, the loss of reputation can be devastating. Even if you win, what most people will remember is that you were sued. For this reason, it sometimes is desirable to settle a case quickly and quietly.

If a case does settle, and you learn about the settlement because it's a necessary part of your job, it is your responsibility to keep the information confidential. In the vast majority of cases, the company agrees to keep the settlement confidential. If you violate that promise, the company can be sued again by the same person.

More importantly, if news of a settlement gets out, other employees will be tempted to sue. The snowball effect of one leaked settlement can impact the company for many years afterward.

How The Law Evolved

It wasn't always this way. In the past, companies didn't fear lawsuits. Managers didn't worry about being sued. In fact, the idea of the law intervening in the employment relationship is relatively recent.

Historically, employees evolved from slaves and serfs. There were few laws telling lords and masters how to treat their property. This attitude continued into the Industrial Revolution.

The first inroad on employer's rights in the U.S. was a child labor law passed in Massachusetts in 1842. This was highly controversial and was fought vigorously by business. It took a Civil War to abolish slavery in 1865.

In 1926 the first law was passed recognizing the rights of employees to join labor unions. The federal minimum wage law was passed in 1938. After World War II a law was passed that guaranteed veterans their rights to reemployment.

For 20 years, there was virtually no activity for employee rights.

1964 marked a turning point. That was the year the Civil Rights Act was adopted prohibiting race and sex discrimination. In the next 15 years the floodgates opened. Laws and regulations were passed on age discrimination, rights for Vietnam-era veterans, occupational safety and health, affirmative action, sexual harassment and more.

In the 1980's, legislative activity lessened, but the courts got more involved. Not only did the courts give expansive readings to these new laws, but they virtually invented the concept of wrongful termination and greatly expanded the right of privacy. For the first time, they allowed employees to claim damages for stress.

In the 1990's Congress became active again, passing three major pieces of legislation: the Americans with Disabilities Act, the Civil Rights Act of 1991, and the Family and Medical Leave Act. The 2000's saw Congress pass major amendments to the ADA, undoing 15 years of Supreme Court cases that narrowly construed the law, as well as changes to the FMLA that granted leave rights to families of active duty military personnel.

Before 1980, "employment law" did not exist. Today it's the specialty of thousands of lawyers. For employers, the future promises more legislation and more litigation.

Four Key Concepts

There are four key concepts that transcend the topics covered in the rest of this manual. These concepts will help you avoid all types of employment lawsuits. They also are good guidelines for other business dealings.

Four Key Concepts

1. be consistent
2. have legitimate business reasons for decisions
3. document events
4. call the experts

(1) Be Consistent

Be consistent in the way you treat your employees. You can't discriminate on the basis of sex, race or other classifications. Even if people are the same sex and race, you still must treat them the same. That's because in wrongful termination cases the courts say that employers have a duty of good faith and fair dealing. In other words, you must treat all employees fairly. The easiest way to prove you treated people fairly is to show you treated all of them the same.

The idea of consistency is taken very seriously by the courts. For example, you must be consistent in documenting events to support your decision to fire an employee. You must document the actions of all employees in the same position in order to prove that one person should be disciplined. Federal regulations say that when a charge of discrimination or harassment has been filed, the employer must preserve all Human Resources records relevant to the charge, which "include HR or employment records relating to the aggrieved person and to all other employees holding positions similar to that held or sought by the aggrieved person." 29 C.F.R. §1602.14; emphasis added. If you don't have the necessary records, a jury is allowed to infer that the missing documentation would have been favorable to the employee. That's what happened in a 2001 federal appeals case, where the employer did not have a single piece of documentary evidence supporting its assertion that it had fired an assistant vice president for inferior performance. The jury found that the real reason was sex discrimination, and its award of nearly a half million dollars was affirmed on appeal.

Let's say you have salaried employees working for you. They don't use time cards. You are aware of who is coming in when, but as long as nobody abuses it, you don't care if people are a few minutes late. You have a little flexibility.

Imagine you've hired a new employee and you notice he is always late -- 30 minutes to an hour. This is taking flexibility too far. You decide to document the late arrivals. After two weeks, you call the HR department and say you want to discipline the employee. The HR rep is impressed with your documentation. Then she asks, "What time did everybody else get in?" You say, "Everybody else was on time." She says, "Prove it."

You can't prove it because you didn't keep consistent documentation. If you fire this person for tardiness, he will argue what every tardy employee has argued throughout history: everybody else was late, too.

If you single out employees for documentation or discipline, you are not treating them fairly and you have violated your duty of good faith and fair dealing.

There is a practical reason to treat people consistently: it will stop you from discriminating unintentionally.

(2) Have A Legitimate Business Reason

The second key concept is to have a legitimate business reason for everything you do. It is perfectly legal for you to treat people differently if you have a legitimate business reason for doing so.

For example, when you are hiring, you might receive twenty or 200 applications for the job. You have to pick one person. By picking one, you are discriminating, in the larger sense of the word. But it is not illegal to discriminate as long as the person you hire is the most qualified for the job. You can always hire the most qualified person, as long as you define qualifications consistently.

Legitimate business reasons are directly related to work. *Performance* is a legitimate business reason for giving one person a higher merit increase than another. *Employer rules* sometimes allow you to treat people inconsistently. For example, it's common for employees not to receive vacation their first year of employment.

Business conditions also allow you to treat people inconsistently. Let's say you have two secretaries who have the same general job description. But one is responsible for answering the phone, and the other isn't. You've told your customers, whether internal or external, that your phone is

answered from 8 to 5. You have a legitimate business reason for requiring that secretary to be at work on time, and not to care if the other secretary is a few minutes late.

Whenever you make decisions about who will be hired, promoted, trained and fired, you should be able to articulate a legitimate business reason.

(3) Document Events

Did you know that there is something that can help you improve employee performance, reduce the risk of being sued, and improve your chances of winning if an employee does sue? It's not a magic potion, it's documenting events, our third key concept. As a manager, you need to write down what happens with your employees on a day-to-day basis. A case could take up to five years to get to trial. You could be gone by then. If there's no documentation from you, the company won't know how to defend it. They won't know what was on your mind when you made your decisions.

Even if you aren't gone, you can forget what happened five years ago. And even if you have a crystal clear memory, you still need documentation because if you don't, then it's your word against another's.

When to document

Documentation is an essential part of the two-way communication between you and your employees. It lets employees know what you require from them. It gives the employee a chance to correct a problem and avoid termination. It can mold expectations so that, if an employee is terminated, the employee is not totally surprised, feels treated more fairly, and is less likely to hire a lawyer. It shows the employee's lawyer (and, if you get there, a judge and jury) that you had clearly communicated legitimate business reasons for your actions, and that the employee's case is weak.

Maybe you think you can simply talk to an employee about a performance or discipline issue and not bother with documentation. Often, that just doesn't work. It's hard to deliver bad news, and many managers have trouble doing that clearly and firmly. It's also hard to hear bad news, and the employee may well get only part of the message. Even worse, if there's a lawsuit, you and the employee will probably

remember the conversation differently, and a jury made up of worker bees—as most are—may well decide to believe the employee’s version, since you have no documentation to refute it.

Even if you don’t write it down immediately, you can go back later and document events. Put the date you wrote the notes on the top, and then in the body of the memo, write down the date it occurred. The attorney for the employee can still make an issue about the delay, but you are in a much stronger position with late documentation than with no documentation at all. *Never* manufacture evidence to bolster your decisions, no matter how strong the temptation.

Documenting is simple. Use your calendar, notebook system or engineering log to keep track of informal warnings and praise-worthy accomplishments. This can be done manually or on computer. Whenever an employee makes a mistake, make a note on that date. Write just a sentence or two. If it turns out it was just a minor problem -- everyone makes mistakes -- you never need to use that information.

But if you see a consistent pattern of the same kinds of mistakes, you can put it in a warning or review. When you do that, make a copy of your informal documentation and put it in the official HR file. The same goes for noting the good ideas and accomplishments of employees.

Save message slips, work orders or reports that show employees' mistakes. In some states, you must save these in the official Human Resources file. In others, it’s “appropriate...reasonable, and not unusual” for a manager to keep his or her own files, as a 2005 appellate decision noted. And in still others, including California, a manager can keep a separate working file of documents, as long as they aren't used to judge an employee. As a federal appeals court has noted, “An employer which documents its reasons for taking adverse employment actions can often be more suitably described as sensible than devious.”

Many times, you don't know if you are going to use an incident in the employee's performance appraisal. It depends on how the employee acts in the future. So keep the note for a while. If the employee shows no other signs of a problem, throw it away. If instead the employee's performance deteriorates, you can show the first time it occurred. Attach this evidence to the performance appraisal or warning as backup documentation.

State and federal laws and regulations mandate that certain kinds of records—payroll, employee benefit information, interview notes and job applications, discrimination and harassment investigation documents—must be kept for certain periods of time. Be sure to check with HR or the Legal Department to find out what you need to keep, where, and how long.

The official personnel file

In many states, employees have the right to see their own personnel files. You may be able to put reasonable limits on when, where and how often employees may review their files. Your state may require you to give employees copies of their file, or at least copies of documents they've signed.

You also may be required to show employees documents before you put them in the file.

As a practical matter, it's best to get employees' signatures on all warnings, performance appraisals and other important documents, to prove they received them. But don't go overboard and threaten employees with discipline for insubordination if they refuse to sign. That's wrongful termination, according to a 2002 state Supreme Court decision.

How to document

Follow these simple rules whenever you give a written document to an employee:

Assume a judge is going to see your disciplinary memo, so write a memo you want a judge to see. It should look professional. Type it, or write neatly. There is nothing more frustrating than having good documentation that no one can read.

Fill out all company forms completely, to show you are following all procedures conscientiously.

Don't give conclusions without facts to back you up.

Never say, "You have a bad attitude." That's a conclusion. You can't prove a person's attitude. You can only prove behavior. You don't care what an employee's attitude is, as long as the behavior is satisfactory. List

the objective, verifiable facts that led you to the conclusion that there was a bad attitude. For example:

"Two times on May 15, Terry asked you to help out and you refused. On May 16 and 17, you slammed down the phone, swore in a loud voice and stomped away from your desk six different times."

That's objective. It's verifiable. It's not "bad attitude," it's "unprofessional behavior."

Don't say "frequently" there is a problem. That's not objective or verifiable. Instead, say how many times. Or better still, "On (this date) at (this time) you (did this)."

Don't use subjective words such as common sense, good judgment, ambitious, loyal. In order for employees to improve, they must know exactly what to do. They won't know how unless you outline objective, verifiable behavior.

Use clear, precise language. Don't use big words that people may not understand. Consider translating services for employees whose second language is English.

If you are angry, take time to step back and re-assess the situation before you start writing. Don't let your emotions get the better of you.

Avoid extremes. Never say never, always avoid always.

“E-mail = Evidence”

E-mail is wonderful. It's fast and effective, low cost and easy to use, and all of us have come to depend on it. E-mail feels like a phone call—quick and casual—without the hassles of telephone tag. But, unlike a telephone call, e-mail creates a document, which can be reproduced exactly and may have to be explained in the harsh light of a hostile courtroom. The December 2002 Pew Internet & American Life Project survey on e-mail on the job found that more than 1/2 of the 57 million workers who use e-mail send 10 or fewer messages a day. But about 10% are “power e-mailers” who spend more than 3 hours a day on e-mail, sending and receiving more than 70 messages on an average work day.

More than 90% of business documents are now created electronically, and only 30% are ever printed out. No wonder state and federal rules of evidence consider e-mail as a business record, fully admissible as evidence in court. These days, the first thing the lawyers on both sides do is hire a computer forensics expert to find all the relevant e-mails.

One recent horror story involved a woman employee who hated her job and started talking to a competitor about working for him. He and she developed an e-mail relationship – no, not sexual. The relationship was based on her sending him company gossip, proprietary documents, and trade secrets. Unfortunately for her, she accidentally sent a copy of one of the e-mails to a colleague at her company. When the company found the e-mail trail they didn't just fire her – they called the FBI. She decided to cooperate and testify against her pen pal, who went to federal prison for soliciting trade secrets.

Company e-mail, computer files and web visit logs:

- ✓ are admissible in court
- ✓ are not private to the employee and
- ✓ may be accessed at any time by the employer (even if the machine is at employee's home)

Under federal law, e-mail created on company systems belongs to the company, and workers have no legitimate expectation of any privacy. You do not have a right to privacy to anything you do on the company's machines in your own home. And if you do work on your own personal computer, it can be subpoenaed in a case, confiscated by the opposing side or the government and reviewed for admissible evidence.

In fact, discovery in lawsuits is very broad and includes not only e-mail, but also:

- ✓ web visit logs
- ✓ hard drives
- ✓ instant messages
- ✓ PDA's
- ✓ pagers
- ✓ voice mail
- ✓ laptops
- ✓ backup tapes
- ✓ cell phone call records

For lawyers, e-mail can be a gold mine—or a land mine! E-mail has been used to prove:

- Harassment
- Discrimination
- Antitrust
- Retaliation
- Americans With Disabilities Act
- Whistleblower
- Insider trading
- Accounting Fraud
- Theft of trade secrets

A few horror stories from recent cases make the point. For example, in the Microsoft anti-trust case, Bill Gates testified under oath that there had been no discussions with Netscape about a cooperative agreement, but e-mail from a Microsoft executive directly contradicted his testimony. In fact, there were numerous issues in that case where Microsoft executives testified one way, but were proven to be lying by e-mail. That's why they lost.

Another is the case from New York where a woman was fired for failing to reimburse the company for personal expenses on her corporate credit card. She was fired, which was legal. But then her manager sent an e-mail to 6 managers, some of whom sent it to other managers, one of whom sent it to some employees. In the e-mail, the manager said the woman was fired for credit card fraud. She sued for defamation – there's a difference between failing to reimburse and fraud – and the jury awarded her over one million dollars. Then there was the Silicon Valley case where a woman was laid off in a general layoff. She suspected the reason she was picked for layoff was because she refused to sleep with

her boss. When she sued and her lawyer got into the e-mail, surprise! Her boss had written an e-mail saying, "I don't care what it takes, fire the bitch."

And it's not just what you send -- receiving certain types of e-mail can hurt you. In one case, a manager fired an African American employee who was not performing. The employee sued, and during the course of discovery they found out that the manager had received 4 racist jokes at work from a joke mailing list. The employee wanted to use these jokes as evidence of the manager's intent to discriminate, and guess what the manager's defense was? "I just received these jokes. How can that show intent about anything?" But the court said, "Well, if you just got one or two and deleted them, that would be different. But since you got more than that, you should have written to the person sending them, and said you didn't want to get material like that."

So, if you frequently receive offensive material, simply ask to be removed from the list. This will show your good faith. Now, it's perfectly okay—in fact, it's a very good idea-- to routinely delete e-mail. But by the time this program is over, you may be thinking there are some questionable e-mails that you would like to destroy. These are what we call smoking guns.

Now, should you go back and destroy your smoking guns? NO! Deleted e-mail is a 'red flag' for investigators. Where there are thousands of documents something that is relatively innocuous could be missed. But if it's deleted that will get their attention. Deleting selective e-mails is like putting up a large sign that says PLEASE LOOK HERE.

Forensic experts can reconstruct hard drives to reveal previously deleted data. "Deleted" e-mail is a lot easier to reconstruct than paper documents. If you shred a letter and throw it in the garbage, you certainly don't expect someone to go through your trash, take out and reassemble the shredded document and use it as evidence against you. But that's just what can happen with e-mail. Deleted E-mail is often found on backup tapes or other people's machines, and sometimes these experts can go back 8 generations of deletions.

If the e-mail is evidence of illegal activity, deleting it is considered destruction of evidence, a felony. That can lead to large fines or imprisonment. You could go to jail. So don't delete questionable e-mails.

So now that you've read the bad news, you're probably wondering what you can do to protect yourself and stay out of jail. The best way to protect yourself is not to be involved in any illegal activity or express any offensive opinions. In fact, if you are the kind of person who is involved in illegal activity, please DO use e-mail and leave a trail so you can get busted. You deserve it.

But if you're a good person trying to do the right thing, then use e-mail only for straight-forward business purposes. Before you send an e-mail, there are a couple of tests you can give yourself for deciding if something should go in e-mail

- Would I write this down if it existed forever?
- Would I put this on a postcard?
- Would I want to see this in the newspaper?
- Would I like this to get into the hands of my worst enemy?

Some things just should not go in an e-mail. Don't write about legal risks or employee problems to HR or management --call instead!! Don't ask legal questions to non-lawyers. Avoid making legal conclusions like "that's illegal" or "that's harassment".

For example, in one case a hospital terminated one of its employees. She sued for gender discrimination and retaliation. Several months before she was let go, she had filed an internal complaint for sex discrimination. The hospital claimed that her complaint had nothing to do with the termination, but the hospital lost. A key piece of evidence was an e-mail sent from her manager to his boss the day after she filed the complaint, saying: "I'd like to see what options we have right now simply to lay her off."

Once you decide to send e-mail, here are some best practices for using e-mail:

- ✓ know and follow employer policy
- ✓ assume a boss or a judge is reading your e-mail
- ✓ don't send an e-mail in anger
- ✓ don't be sarcastic
- ✓ beware of first drafts
- ✓ do not send or receive jokes from or to work
- ✓ insure mail lists are current for confidential information
- ✓ limit copies
- ✓ don't mark 'attorney client' unless authorized
- ✓ don't mark 'company confidential' unless appropriate

In other words –

Think before you hit send!

E-mail retention (and destruction) policies generally are legal if for routine business reasons. There are special retention rules for accountants, government employees, and brokerage houses. And in all industries destruction is not allowed if the e-mail is relevant to current lawsuits. But generally speaking it is LEGAL to erase e-mail, and you should delete e-mail if it does not serve a business purpose.

Now you may be thinking, “Wait a minute, I thought we shouldn’t delete questionable e-mails?” There is a difference between deleting questionable e-mails and routine e-mail destruction. One federal appeals court looked at 3 factors in deciding whether a company is properly destroying its documents: 1. Is it reasonable for the business purpose for which the document was created? 2. Has there been a lawsuit filed about the subjects covered in the document? 3. Was the retention policy adopted in good faith?

Routine destruction is, well, routine. Masses of e-mail are destroyed, not just one or two. E-mail is routinely destroyed when it is considered dated. When a project ends, any e-mail related to that could be destroyed. But when you’re picking and choosing which e-mail to destroy, that’s a bad sign.

It’s also a good idea for employers to have clear e-mail usage policies which:

- ✓ State that e-mail is not private and belongs to the employer
- ✓ Reserve right to monitor e-mail and computer usage
- ✓ Prohibit use of e-mail in violation of any employer policies
- ✓ Prohibit sending jokes, chain letters, commercial solicitations
- ✓ Explain limits of computer usage including reasonable personal use

And, by the way, if any personal use is permitted, employees cannot be barred from using e-mail to discuss wages, working conditions or union activities.

Just a note on monitoring: If your company chooses to monitor employee e-mail, it's crucial that you tell employees that, and that you follow up on whatever the monitoring finds. For instance, if you're monitoring for productivity reasons, but you find e-mail that might be sexual, racial, or other illegal harassment, you've got an obligation to investigate and discipline, as provided in your company's anti-harassment policy.

And, all employees should be trained on the proper use of e-mail, compliance with all laws, and your company's policies and values. In fact, in a February, 2003 article, Fortune magazine noted that while 80% of companies have written e-mail policies, less than 25% do any kind of training. And that's led to problems! Your policy is only as good as its implementation.

E-mail is part of every manager's toolkit, and should be used by managers proactively. How can good e-mail help you? Saving e-mails can make a manager's job easier, since e-mail can show employee progress to goals over the year and enables a manager to spot trends and problems early. E-mail documentation makes performance evaluations easier to write, too. Before the PIP process, e-mail can prove that there was poor performance/behavior by the employee, that the manager set clear expectations, and that the manager coached the employee over time.

So e-mail can help you or hurt you. It's either a gold mine or a land mine, and that's up to you.

(4) Call The Experts

The fourth key concept is this: Call the experts -- your company's personnel or legal department. Experts should be consulted early on, before there is a problem. It's always easier (and cheaper!) for an expert to give advice at the beginning of a problem than at the end.

Call whenever one of the following events occurs:

- you receive a complaint about sexual harassment, discrimination, overtime pay or other legal claim;
- you hear from a former employee threatening to sue, or asking for a copy of the personnel file;

you want to terminate an employee who is over 40, minority, female, or with seniority in the company;
you want to terminate a highly paid executive or key player (especially employees with knowledge of trade secrets, customer lists or other confidential information);
you want to terminate an employee who has complained recently about a real or perceived legal violation by the company (i.e., safety hazard, discrimination); or
you want to terminate an employee on the spot, without prior warning.

Of course, the above list is not exhaustive.

If your company has a personnel department, it's important to call them because the law changes. It changes rapidly. Something in this book probably will be wrong by the time it sees print. Your personnel department is supposed to keep current on the law and can let you know of any major changes.

You also should contact your personnel department so that you can benefit from their experience, and ensure that you are acting consistently with company policy and practice.

If you contact personnel, they tell you what to do, you follow their instructions and then there is a lawsuit -- you can blame them. And the company is far more likely to back your decision if you've had their independent professional perspective.

A Success Story

A woman got a job as an Administrative Assistant. She and her boss got along great from the first time they met. They immediately began teasing, joking and bantering with each other. But after a while, she felt he had crossed a line.

She filed a complaint of sexual harassment with the personnel department. They investigated by talking to the boss and to the other workers in the area. They determined sexual harassment had not occurred, because she had welcomed the sexual teasing.

She didn't agree with the decision, so she filed a lawsuit against him in federal court. She continued working for him. But after a while, she felt

uncomfortable working for someone she was suing. So she went to a doctor. He put her out on stress disability leave.

After two years, the case was still going on, but her doctor cleared her to return to work.

She went back and was given another Administrative Assistant job, at the same grade level, reporting to the same boss. After two weeks she quit and filed another lawsuit claiming retaliation. She said the tasks she was given to do were not as good as before. She was denied management training classes. And she claimed her boss wouldn't talk to her about anything except work.

The sexual harassment and retaliation cases were consolidated for trial. At trial, the judge found she had not been sexually harassed. But that did not dispose of her retaliation claim. Even if she was not harassed, she still might have been retaliated against.

On the retaliation claim, the judge found that the jobs she was given were not as good as the jobs she'd been given before. She was denied management training. And he found that the manager wouldn't talk to her socially.

But the manager and the company won the lawsuit. And they won it because they followed the four key concepts.

The manager was *consistent*. The jobs he gave her to do were the same type of jobs he gave other Administrative Assistants.

He had a *legitimate business reason* for not giving her management training -- she wasn't a manager and she wasn't on a management track. And he had a legitimate business reason for not talking with her socially, since he was scared to death he would get sued again.

Third, he *documented* everything: the jobs he gave her, the jobs he gave other assistants; why he denied her management training.

And fourth, he *called an expert*. He had the personnel department involved every step of the way, for an independent and professional perspective on his decisions.

If you follow the four key concepts, there is no guarantee that you won't get sued. As a practical matter, you can be sued at any time by anybody for anything. But if you follow the four key concepts, your likelihood of being sued is greatly decreased, and your likelihood of winning is greatly increased. While Fair Measures has been teaching these key concepts since 1982, a 2003 survey of human resources professionals re-emphasized their importance. When asked for the worst firing mistakes made by managers, the top choice—made by 86.2% of the HR pros—was inadequate documentation. Another documentation problem, past evaluations were better than the employee deserved, came in second, with 68.6% of the votes. Number 3 was inconsistency (similar employees weren't fired), with 36.5%, and the fourth mistake, close behind at 27.6%, was another kind of inconsistency, bypassing normal disciplinary procedures.

More important, if you follow these four key concepts you will treat employees fairly. Fairness is the spirit of employment law.

As speaker Mark Sanborn says, "The great leaders act on the basis of commitment, not compliance. [They see the law] not as oppressive obligation, but as a creative opportunity to do something worthwhile."