

Employment Law Brief

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Employment Law Issues and Other Hot Topics for Management

July 1, 2009



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E-Discovery Guide for Businesses, and the Executives and Human Resources Professionals that Run Them

Over the past few years there have been numerous articles warning attorneys, corporate executives, and HR professionals to beware the pitfalls of electronic discovery. This is due largely to the fact that managing electronic discovery to comply with shifting expectations of the court system can be challenging while identifying, collecting, and producing electronic information is cost-prohibitive. This article covers a few of the basics that companies, executives and human resources professionals need to know, and gives pointers on tackling e-discovery before and during litigation.

Although the costs of e-discovery can be high, there are ways to keep costs down. Companies must act proactively and institute policies before e-discovery urgently needs to be undertaken. Part of good preparation is having an understanding of who the important players are on your e-discovery team and being familiar with the natural steps in the e-discovery process before and after litigation is in full swing. For the corporate executive or HR professional, it can be very frustrating to have to suspend the company's regular work to deal with urgent e-discovery demands and an imminent litigation threat. The more work the company does before the situation is urgent, the less costly and disruptive the emergency will be to its day-to-day business operations.

The electronic discovery team will have three parts – the company liaison, the company's attorney – whether in-house or outside counsel – and a technical computer expert. The technical expert may be the company's IT professional, or it may be a vendor. Either way, it is possible that the computer technician may be called to testify in court at some later date, which makes his or her qualifications, defensible practices and ability to present information to a judge or jury important factors to consider when designating or hiring the technician.

The Company's attorney should be consulted prior to litigation as it formulates and implements a document retention policy. Company executives should also understand the company's document management policies and know where all categories of documents are kept, whether they are backed-up, and for how long they are kept.

For outside counsel, challenges arise prior to and during litigation when we must, on the one hand, ensure all data is being preserved by our corporate and executive clients, and, on the other, work with the computer technicians to identify, collect, and produce information. We must also take steps to ensure the opposing party is complying with their responsibilities related to the preservation and production of electronic information once litigation is anticipated.

It is important to remember that attorneys are not qualified computer professionals or forensic technicians, and often lack the basic knowledge to ask the right questions. A tech-savvy client can sometimes provide technical guidance to the attorney, but many companies or smaller employers lack technical knowledge just as the attorney does. The company's counsel should take an active role in examining the qualifications of the designated computer technician, and work to keep the technician's costs down by obtaining several price quotes for forensic work and asking questions to uncover less expensive alternative procedures, depending on the issues involved in each particular case.

When faced with litigation, whether an actual case or claim has been filed or not, it is crucial that corporate clients and their attorneys utilize the knowledge of their technology expert, and ask question after question until everyone on the team understands what information can be identified and collected, how to collect the electronic information in the most defensible and cost-effective manner, and then how to produce it to an adversary in the middle of an intense, fast-paced legal process.

To summarize, it is essential that companies and the executives and human resources professionals that manage them: (1) understand their individual responsibilities related to document management and the expectations of the legal system; (2) set up simple document retention rules and disaster plans before disaster hits; and (3) then, once there is a threat of a lawsuit or administrative claim, quickly enact the disaster plan so the company can continue operating efficiently while complying with the expectations of the court.

Company executives and HR professionals should:

- Review your company's document retention policy, or enact one if you don't already have one. Know which

documents and records need to be kept for a specific time period and don't keep documents and records longer than you need to.

- Remember that e-mail communications, including instant messages and tweets, sent on Company equipment are not private, and the equipment is not personal property. Make sure employees are reminded of this policy, and that it is explained in the Company's Employee Handbook.
- Know that there is no such thing as "delete". Once you are in litigation mode, the company's attorneys and the computer technician will see what's been sent around the workplace, and may have to reveal it to the opposition. Business communication should be professional, no matter how friendly coworkers are with each other.
- Never erase or scrub a computer once the company has notice of a potential legal claim. The act of destroying information may lose your case for you – even if the information that was permanently "wiped" had nothing to do with the claim! Finding out that someone in the company has intentionally or negligently deleted information is outside counsel's biggest fear.
- Once the company has notice of a potential legal claim against the company or one of its current or former employees, immediately suspend or limit the document destruction policy and distribute instructions to all potentially affected employees. Being notified of a claim can be as simple as receiving an e-mail that contains a complaint about a company practice or a workplace incident.
- Get a team organized and let them hit the ground running if a claim or lawsuit is filed against the company. You'll need: (1) an internal corporate liaison who knows which employees may have information related to the claim and where to locate relevant documents and records; (2) outside counsel who can explain the "discovery" process and manage opposing counsel; and (3) a computer technician or expert e-discovery vendor.
- Don't let your outside counsel become an expert at electronic discovery at your expense. Even though your

attorney isn't a technical expert, he or she should have some experience with electronic discovery, know some vendors who may be able to provide technical support, and have a basic knowledge of the process as the team evaluates and responds to the document requests being lobbed at the company by opposing counsel.

- Once you are faced with the identification, collection and production of electronic documents, your attorneys' fees and the fees you pay for the technical work could skyrocket. That said, there are many different electronic discovery technicians who would love to have your business and their price quotes often differ dramatically. Push your outside counsel to get different quotes and manage the e-discovery service provider with a firm hand on your behalf.

Many larger companies have responded to the challenges of e-discovery by hiring inside e-discovery counsel or technology experts to reduce costs over time. If you don't have this luxury, by following the guidelines above you may at least be able to get more control over the process earlier, and save costs you might otherwise be forced to incur.

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