

Electronic Discovery Alert

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Employment Law Issues and Other Hot Topics for Management

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California Enacts Electronic Discovery Act

On June 29, 2009, Governor Schwarzenegger signed the Electronic Discovery Act (the “Act”), which took effect immediately. In 2008, the Governor had vetoed the Act, among many others, to try and focus attention on California’s ongoing budget crisis. The Act mirrors amendments made in 2006 to the Federal Rules of Civil Procedure, although there are some differences between them. The Act governs civil lawsuits in California, and provides much-needed guidance on how parties must handle electronically stored information (“ESI”).

Defining, Collecting, and Delivering ESI:

The Act was passed because legal cases of all kinds now routinely involve potential evidence that is stored electronically including e-mails, instant messages, documents, various versions of the same document, records of time spent on computers, individual activity on computers or other electronic devices, spreadsheets, slides, and records of financial transactions. The Act allows parties in civil litigation to obtain “reasonably accessible” information from the litigation opponent and provides a mechanism for the party requesting information to specify the form in which the information will be provided.

Once a request for information is received, the burden is on the party producing the information in response to a request to either produce the information, or object to the request on the basis that the information is not reasonably accessible. If the court affirms that the information is not reasonably accessible, the requesting party must then establish good cause for why the information should *still* be produced. If there is good cause, the court can then limit the discovery, impose special conditions, or order a cost-shifting so that the requesting party bears some of the burden of identifying, collecting, and producing the information.

Safe Harbor and Claw-Back provisions:

The Act provides important guidance on a couple of tricky areas for all litigants. It is often the case that ESI is lost or destroyed after a party has notice of a potential claim. Sometimes, the loss of data is purposeful, and can lead to drastic sanctions against the party who destroyed evidence. In other cases, the loss is inadvertent and the destruction was unrelated to the legal claim. The Act includes

a “Safe Harbor” provision so that if a party that can prove the loss or destruction of evidence was a result of routine, good faith operation of its electronic system, the party will not be subject to sanctions. Unlike the federal rules, the Act’s Safe Harbor provision includes ESI that is “damaged, altered, or overwritten” in addition to lost information, and thus provides a broader measure of protection for a party whose data is inadvertently unavailable.

The Act allows a party who has inadvertently produced ESI covered by the Attorney-Client privilege or Work-Product doctrine to its opponent to pull-back or “claw-back” the information. First, the receiving party must be notified that the information is privileged and was inadvertently produced. Once it receives the notice, the receiving party must segregate and return the information, and cannot use it in the litigation unless and until the dispute is resolved and there is a determination that the information is or is not privileged. It is important to note that the Act’s provision related to inadvertent disclosure of privileged information only outlines the procedure for dealing with the inadvertent disclosure, and does not address the question of whether the privilege was waived by the disclosure. This means that when there is an inadvertent disclosure followed by an assertion of privilege, courts may have to make the final determination of whether or not formerly privileged information is no longer privileged on a case-by-case basis.

Meet and Confer Requirement:

The Act failed to include a provision instructing parties to meet and confer about ESI during the litigation process. Recognizing this void, the California Judicial Counsel quickly enacted an amended California Rule of Court 3.724, “Duty to Meet and Confer”, on August 14, 2009. The amended Rule of Court instructs the parties to meet and confer 30 days prior to the initial case management conference about all relevant ESI matters including preservation, form of production, time limits, scope of discovery, privileged or confidential information, cost allocation, and the development of a proposed plan to handle the discovery and production of the ESI if necessary.

Conclusion:

This is a brief summary of some important provisions in the Act and the amended Rule of Court that covers the parties’ meet and confer requirements. If you have any questions regarding the preservation of ESI, potential legal claims and the ways in which electronic information may be related to that claim, or the full text of the Act, you should contact your legal counsel.

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