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Feature: With Updated E-Discovery Regulations, Employers Must Face New Battle

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Recent amendments to the Federal Rules of Civil Procedure relating to electronically stored information raise the bar for what will be expected of e-discovery in terms of employers' monitoring and policies. Employers will ultimately feel the brunt of these sweeping changes, with dramatic changes to the way discovery will be conducted in federal court, where most discrimination suits are filed.

By David Walton

With more than 80 percent of electronic documents never printed and 60 billion plus e-mail messages sent every day, e-discovery has been an important issue for some time.

However, the new amendments to the Federal Rules of Civil Procedure relating to electronically stored information (ESI)—which went into effect December 1, 2006—raise the bar for what will be expected of e-discovery in terms of employers' monitoring and policies. Employers will ultimately feel the brunt of these sweeping changes, with dramatic changes to the way discovery will be conducted in federal court, where most discrimination suits are filed.

And, because the typical individual plaintiff in an employment lawsuit has very little ESI to preserve, search and disclose during discovery, employers face an additional burden in obtaining information under new regulations.

The key is to prepare for compliance, including setting up systems, protocols and policies. Employers will ultimately have the best position in preserving, searching and producing relevant ESI in the most efficient manner when hit with a suit.

Waiting for a lawsuit is not an option. Due to the costs of searching and producing ESI, employers will be forced to settle numerous lawsuits because the expense associated with discovery alone will make the case too steep to defend. And good plaintiffs' lawyers know this as they prepare to use the ESI sword against employers. Companies should be formulating their strategy now.

Discovering new amendments and responsibilities

Before the new amendments, ESI was treated as a subset of documents under the Federal Rules of Civil Procedure. But the revised rules create a new category of discovery.

One of the major changes clarifies that ESI will almost always need to be produced in its

electronic form. It is no longer good enough to print out hundreds of e-mails and produce them to the other side (unless your adversary agrees or the judge lets you do it). This alone is a major change and challenge.

Also, it is now trial counsel's responsibility to know his or her client's IT system and the location of responsive data. Trial counsel can no longer tell the judge, "I am not a tech guy, Your Honor, so I don't really understand this."

Similarly, counsel cannot rely blindly on what is told to him/her by the client regarding its ESI and related systems. Instead, attorneys must speak directly with the client's IT department to find relevant ESI sources and understand the backup system and retention policies. Firsthand knowledge is vital.

Further, counsel will no longer use the "head in the sand" approach to e-discovery—"I am not going to go after your e-discovery if you don't go after mine." This is especially true in employment cases where good plaintiffs' lawyers are going to learn how to use e-discovery as a sword.

Since it is much easier for employee-plaintiffs to comply with the new rules, there's a much greater obligation for employers. This imbalance poses the utmost threat and biggest challenge to employers who are defending against discrimination lawsuits.

Preserving obligations and litigation holds

Create solid document retention policies

In order to comply, employers should adopt comprehensive document retention policies and establish litigation protocols for preserving, searching and producing ESI. These policies should address five key issues: creation of documents; storage; use; retention and destruction; and purging.

Employers would be wise to resist the urge to use general forms in adopting these policies. A good and effective policy must be tailored to the employer's specific business needs, and be in writing and simple to adopt and follow. The worst thing would be failure to comply. This alone will likely prevent the employer from arguing that any destruction of potentially relevant ESI was inadvertent or should not be sanctioned.

An effective document retention policy must also include:

- Reasonable retention periods complying with the myriad of laws that contain specific record-retention requirements.
- Records in all formats: paper, photographic and electronic.
- Separate retention requirements for official copies and duplicate records, drafts, working papers and notes.
- Coverage of all the employer's electronic devices and hardware, with specific instructions for obtaining documents and the actions to be taken when certain events occur.
- Monitoring and auditing of employees to ensure compliance.

With a policy in place, employers have a safety net in dealing with new preservation and production obligations. Specifically, if documents or ESI are purged in the normal course of business operations before the duty to preserve arises, then it is unlikely that a court will find that

the purging was improper or illegal. A document retention policy is critical in showing that the document was destroyed as part of normal business operations—and not because the individual knew that litigation was on the horizon.

Ensure litigation holds are in place

All good document retention policies also provide for litigation holds. When an employer is notified of potential litigation, this is really the best and only way to swiftly stop routine destruction of information, and identify and preserve all potentially relevant ESI.

Holds must be in writing, issued to employers, broad in scope and applied to all key players. To ensure consistency, develop and maintain related forms in advance, even though they should be tailored to specific circumstances.

When opting for litigation holds, employees should specifically:

- Suspend routine document destruction, in addition to saving/stopping recycling of backup tapes possibly containing relevant ESI.
- Notify archival facilities to halt destruction and preserve ESI.
- Identify all ESI sources and key custodians, and notify them by a written litigation hold memo.
- Meet with each custodian to pinpoint all sources of potentially relevant information, such as hard-copy documents and ESI. An employer should also consider asking each key player to sign acknowledgments certifying they have turned over all potentially relevant documents.
- Get certifications from IT personnel to establish chain of custody.
- Monitor compliance and issue reminder memos.
- Watch out for new and departing employees. Employers should consider taking bitmap images of relevant electronic devices of key and departing employees. This is in addition to creating consistent protocols for hires, transfers and terminations after litigation holds have been issued to certain employees and departments.

These are the minimum steps an employer should use in issuing a litigation hold. Courts expect employers to issue them at the right time and to monitor compliance.

Train, don't over e-mail, and adopt better records management

In addition, training in-house litigation response teams and developing protocols for preserving, searching and producing documents and ESI during litigation and in response to subpoenas will help ensure consistent compliance with document retention policies and litigation holds.

However, complicating this situation is that employers create too many documents. Because each e-mail is a separate document, employees must be trained in the proper use of e-mails. If we do not get e-mail overflow under control, many employers will not be able to afford defending lawsuits involving the production of ESI.

Given this volume of information, employers might also consider establishing a records management department. Even for small employers, it could be the most effective way to control costs associated with document retention while making certain that the employer complies with all applicable retention laws and obligations.

Also helpful is investing in sophisticated software to help standardize collection search protocols. Employers can conduct comprehensive searches on all their data and select which areas need to be harvested.

The landscape is changing for employment litigation, with the new rules titling the scales in the favor of plaintiffs who are in the best position to use the e-discovery as a sword. It's better to prepare now rather than pay for it later.

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