COZEN O'CONNOR

LABOR AND EMPLOYMENT OBSERVER

NEWS ON CONTEMPORARY ISSUES

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IN THIS ISSUE

MESSAGE FROM THE CHAIR

TO THE FRIENDS OF COZEN O'CONNOR:

Our Fall 2007 Labor and Employment Law Observer covers a multitude of topics of interest to in-house counsel, human resources professionals and corporate management.

Recently, the Supreme Court issued an opinion concerning the statute of limitations and pay discrimination claims that is sure to have a significant impact.

There also have been some recent developments on the employment of undocumented workers. The Department of Homeland Security recently issued no-match regulations regarding no-match letters sent to employers when it discovers that a social security number does not match information provided by the employer. An article by our immigration attorney Elena Park highlights how the Department of Homeland Security continues to crack down on the employment of illegal workers with more and more work site raids.

Of additional import is that the federal minimum wage increased to $5.85 per hour earlier this past Summer and will continue to increase over the next two years.

You can read about these and other recent labor and employment developments in this issue of the Observer.

We welcome your inquiries on the articles in this Observer, other matters of interest to you and suggestions for future topics.

Sincerely,
Mark Foley

Chair, Labor & Employment

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NEW SUPREME COURT DECISION IN FAVOR OF EMPLOYERS LIMITS TIME PERIOD FOR EMPLOYEES TO BRING DISCRIMINATION ACTIONS OVER THEIR PAY

In a five-four decision, *Ledbetter v. Goodyear Tire & Rubber Co., Inc.,* 127 S.Ct. 2162 (May 29, 2007), the United States Supreme Court held that Title VII's statute of limitations to file a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) begins to run when a discriminatory pay decision is made and communicated to the employee and that it does not restart each time a subsequent paycheck is issued. The Supreme Court enforced the 180 day period for Ledbetter to file a charge of discrimination with the EEOC, a prerequisite to filing a Title VII lawsuit, and dismissed her sex discrimination claims as untimely. (Note: The time period to file a charge with the EEOC is either 180 or 300 days depending on corresponding state legislation).

Lilly Ledbetter brought a lawsuit alleging that several of her supervisors had in the past discriminated against her based on her gender by giving her poor evaluations which precluded her from receiving the salary increases she would have received if she received fair evaluations. By the end of her employment, her salary was substantially less than her male coworkers. After a trial on the merits, a jury found in Ledbetter's favor despite Goodyear's claim that the performance evaluations and resulting raises were non-discriminatory. On appeal to the Eleventh Circuit Court of Appeals, Goodyear argued that all of Ledbetter's claims were time-barred to the extent that the pay decisions were made more than 180 days prior to her EEOC charge. The Eleventh Circuit agreed with Goodyear and reversed the jury award holding that a Title VII pay discrimination claim cannot be based on allegedly discriminatory events that occurred before the last pay decision which affected employee's pay during the EEOC charging period, and also concluded that there was insufficient evidence to prove that Goodyear had acted with discriminatory intent in making the two pay decisions within the statute of limitations. Ledbetter appealed to the Supreme Court.

In the *Ledbetter* decision, the Supreme Court expanded its earlier holding in *National Railroad Passenger Corporation v. Morgan,* 536 U.S. 101, 114 (2002), which held that the time for filing a charge with the EEOC begins when the discriminatory act occurs. In *Morgan*, the Court explained that discrete acts of discrimination include termination, failure to promote, denial of transfer, and refusal to hire, and that the statute of limitations begins to run when these discrete acts occur. The *Morgan* Court distinguished these discrete acts from hostile working environment claims where a plaintiff may include conduct which occurred outside of the statute of limitation under the continuing violation theory as long as part of the conduct which makes up the hostile work environment claim occurred within the statute of limitations period. *Ledbetter* expands the *Morgan* ruling to hold that a "pay-setting" decision is a discrete act that occurs at a particular point in time and starts the clock on the statute of limitations. The Court rejected Ledbetter's argument that clock should restart because the discriminatory pay decision has continuing effects each time a paycheck is issued to the employee. The Court explained, "[a] new violation does not occur, and a new charging period does not commence, upon the occurrence of subsequent non-discriminatory acts that entail adverse effects resulting from past discrimination." *Ledbetter*, 125 S.Ct. at 2169. Ledbetter did not file a charge over the alleged discriminatory pay decision within 180 days of the pay decision, and the fact that paychecks were issued to her during the 180 days "cannot breathe life into prior, uncharged discrimination."

To suggest topics or for questions, please contact Mark Foley, Esq., Chair of Cozen O'Connor's Labor & Employment Department. Mark can be reached at 215-665-6904 or 800-523-2900 or at mfoley@cozen.com. To obtain additional copies, permission to reprint articles, or to change mailing information, please contact Lori Scheetz 800-523-2900, or at lscheetz@cozen.com.

In response to the decision, several members of Congress have announced an intent to introduce legislation that would reverse the effects of the Court's decision.

For more information contact Victoria Zellers, at 215-665-4707 or vzellers@cozen.com.

ERISA: IS DISCOVERY REALLY LIMITED?

When a lawsuit is brought under the Employee Retirement Income Security Act, 29 U.S.C. 1001 *et seq*., ("ERISA") the defendant often times will attempt to limit the scope of discovery to the "claims file" or the "administrative record." However, whether discovery can be so limited will largely depend upon the standard of review. In this regard, federal courts have recognized three distinct standards of review: (1) *de novo*; (2) arbitrary and capricious; and (3) heightened arbitrary and capricious.

The United States Supreme Court has held that the denial of benefits challenged under ERISA is to be reviewed under a *de novo* standard, unless the plan provides the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan. *See Firestone Tire and Rubber Co. v. Bruch,* 489 U.S. 101, 115 (1989). Courts have tended to apply the *de novo* standard when the plan confers upon the administrator the authority to make initial eligibility determinations "according to the terms of the Plan." Importantly, under the *de novo* standard of review, the court is not confined to the administrative record and may pursue whatever further inquiry it finds necessary or proper to the exercise of the court's independent judgment. In this regard, when courts apply the *de novo* standard of review, plaintiffs are generally permitted to engage in discovery and present evidence outside the administrative record on issues of plan interpretation. Thus, the usual discovery parameters will apply for cases subject to the *de novo* standard of review.

On the other hand, where a plan yields discretionary authority to the decision-maker, a court must review the denial of benefits under the arbitrary or capricious standard. *See, e.g., Leggett v. Provident Life and Accident Ins. Co.*, 2004 WL 291223 (M.D. Fla., Feb. 9, 2004). Courts have tended to apply the arbitrary and capricious standard where a plan includes the following language: "The administrator's determinations shall be final and conclusive so long as they are reasonable determinations which are not arbitrary and capricious," or when the plan confers upon the administrator "full and exclusive authority to determine all questions of coverage and eligibility," or the "full power to construe the provision" of the plan. Courts have, however, refused to apply the arbitrary and capricious standard when the plan language did not grant express discretionary authority. For example, if the decision-maker designated in the plan does not have "the authority to control and manage the operation and administration of the Plan," the arbitrary and capricious standard will not apply. And, even if the plan allows the administrator to promulgate rules and regulations necessary and proper to interpret or administer the plan, without the necessary deference or discretionary language providing the decision-maker with authority to *interpret* the terms of the plan, the *de novo*, as opposed to the arbitrary and capricious, standard will be utilized by the court in assessing the administrator's decision.

In this regard, under the arbitrary and capricious standard, discovery is usually limited to the administrative record as defined by the facts known to the administrator at the time the benefit decision was made. That being said, it is important to note that even under the arbitrary and capricious standard limited discovery outside the administrative record can be allowed. *See, e.g., Nagele v. Elec. Data Sys. Corp.,* 193 F.R.D. 94, 103 (W.D.N.Y. 2000)(review under this deferential standard does not displace using pretrial discovery to determine the actual parameters of the administrative record and whether or not the fiduciary acted arbitrarily and capriciously with respect to a claim for benefits). In this regard, limited discovery has been allowed, even in instances where the arbitrary and capricious standard applies, allowing plaintiffs to evaluate: 1) the exact nature of the information considered by the fiduciary in making the decision; 2) whether the fiduciary was competent to evaluate the information in the administrative record; 3) how the fiduciary reached its decision; 4) whether, given the nature of the information in the record, it was incumbent upon the fiduciary to seek outside technical assistance in reaching a fair and full review of the claim; and 5) to determine whether a conflict of interest existed.

Finally, where a plan provides discretion to a fiduciary or administrator who is operating under a conflict of interest, such case must be reviewed under the heightened arbitrary and capricious standard so that the conflict may be weighed as a factor in determining whether there is an abuse of discretion. In determining whether or not to apply the heightened arbitrary and capricious standard of review, court will need to make a threshold determination of whether the alleged structure of the plan, the interpretation by the administrator and the funding could plausibly present a conflict of interest calling for heightened review. Under this heightened arbitrary and capricious standard, discovery is extended beyond the administrative record to allow the plaintiff to obtain any information that might enable him or her to refute the mandatory showing by the insurer that its decision was free from conflict.

Thus, when defending ERISA benefit claims it is important to initially determine the appropriate standard of review before taking a firm stance on the proper scope of discovery.

For more information contact Sherril Colombo at 305-704-5945 or scolombo@cozen.com.

FEDERAL MINIMUM WAGE INCREASES TO $5.85 PER HOUR

Beginning Tuesday, July 24, 2007, the federal minimum wage increased from $5.15 to $5.85 per hour. This is the first of three scheduled increases called for by the Fair Minimum Wage Act signed by President Bush this past May. On July 24, 2008 the minimum wage will increase again to $6.55 per hour, and on July 24, 2009 the final increase will take effect to lift the minimum wage to $7.25 an hour. The U.S. Department of Labor has issued a revised Federal Minimum Wage Poster reflecting these changes. (The Fair Labor Standards Act (FLSA) requires that employers post a notice explaining the FLSA's requirements in a conspicuous place in all of their establishments). It is available free of charge on the Department of Labor's website at the following link:
http://www.dol.gov/esa/regs/compliance/posters/flsa.htm.

The law provides certain exceptions to the new minimum wage rate. For example, tipped employees can be paid a lower rate of $2.13 an hour in direct wages so long as that amount plus the tips received equals the Federal minimum wage. Companies can also pay new employees under twenty (20) years of age a reduced "training wage" during their first ninety (90) days of employment.

It is important to note that states are free to set their own minimum wage rates higher than the Federal rate, and many have done so. For example, for most Pennsylvania employers the minimum wage increased to $7.15 effective July 1, 2007. New York and New Jersey's minimum wage rates are also currently set at $7.15 an hour. Florida's is set at $6.67 an hour. Delaware's is currently set at $6.65 an hour, but will increase to $7.15 effective January 1, 2008. At least 20 other states also have wage rates higher than the federal minimum. Where Federal and state law have different minimum wage rates, the higher rate must be paid to covered employees.

It is also important to note that these wage rates apply to employees covered by collective bargaining agreements, so that if a Company has an agreement which calls for wages below the new federal or state minimums, those wage rates will need to be adjusted in order to comply with the new minimum wage rates.

These new minimum wage rates may require the attention of your Human Resources or compensation professionals to ensure compliance with federal and state wage and hour laws. If you would like to discuss any aspects of these changes and how they might impact your business or organization, please contact any of the Cozen O'Connor Labor and Employment Department lawyers.

For more information contact George A. Voegele, Jr. at 215-665-5595 or gvoegele@cozen.com.

HOMELAND SECURITY UNVEILS NEW SOCIAL SECURITY "NO-MATCH" REGULATION

Employers will need to re-evaluate how they respond to Social Security Administration ("SSA") "no-match" letters in light of an August 10, 2007 rule released by the Department of Homeland Security ("DHS").

"No match" letters are sent to employers by SSA and/or DHS when it discovers that a Social Security number does not match the information provided by the employer. Under the rule, an employer who receives a no-match letter can, under certain circumstances, be deemed to have "constructive knowledge" that they are employing an illegal alien (and thus subject to civil or criminal penalties), unless they follow the specific "safe harbor" provisions of the rule.

To take advantage of the safe harbor, within thirty (30) days of receiving a no-match letter, the employer must: (1) check its records to determine whether the discrepancy was caused by a clerical error, take steps to correct the error if one is discovered, and verify that the corrected name and social security number now match SSA's records, or (2) if the employer determines that the no-match is not a result of an error in the employer's records, the employer must request that the employee confirm that the name and social security number are correct. If incorrect, the employer must verify the correction and inform SSA of it.

If the employee confirms that the employer's record information is correct, the employer must advise the employee of the date of receipt of the no-match letter and advise the employee to resolve the discrepancy with SSA within ninety (90) days of the receipt date. The employer is under no obligation to advise the employee regarding how to resolve the discrepancy with SSA.

If the discrepancy is still not resolved after ninety (90) days of receipt of the no-match letter, the employer may re-verify the employee's work authorization and identity by completing a new I-9 Employment Verification Form. An employee cannot use a document containing the social security number that is the subject of the no-match letter, and all documents used to provide identity and employment authorization must contain a photograph. This must be completed within ninety-three (93) days of receipt of the no-match letter.

If the no-match discrepancy is not resolved and the employee fails to offer sufficient alternative documentation of identity and work authorization, the employer must choose between terminating the employee or facing the risk that DHS may find that the employer is in violation of immigration laws because it had constructive knowledge the employee was not authorized to work.

DHS takes the position that following the safe harbor rule in a uniform manner for all employees whose social security numbers are challenged by a no match letter should not subject an employer to liability for national origin discrimination.

Companies that employ high numbers of low-skilled workers may be particularly vulnerable under this new rule. Employers should review their policies and procedures involving Social Security no-match letters, and they should consistently follow the safe harbor procedures. Cozen O'Connor's labor group stands ready to assist employers in ensuring its practices comply with the new DHS rule.

For more information contact George A. Voegele, Jr. at 215-665-5595 or gvoegele@cozen.com.

IMMIGRATION ENFORCEMENT: RAIDS ON WORKSITES

While Congress struggles to cobble together workable immigration reform policy, the Department of Homeland Security (DHS) continues its enforcement efforts of our current immigration laws. Worksite raids by the Immigration and Customs Enforcement agency (ICE) — the "police arm" of the DHS charged with enforcing immigration laws — have only been increasing nationwide. During fiscal year 2006 (starting in October 2006), ICE reports it "arrested 718 individuals on criminal charges in worksite investigations and apprehended another 3,667 illegal workers on immigration violations, more than a three-fold increase over 2005." (*See* 2/28/2007 News Release at www.ice.gov). Dubbed "workforce enforcement" initiatives by ICE, raids can be extremely costly for businesses. Employers must learn what the immigration laws expect of them, so as to avoid being the next target.

ICE's aggressive workplace enforcement activities come as no surprise. DHS has made numerous public announcements that ICE would crackdown on employers who knowingly hire illegal workers. Julie L. Myers, Assistant Secretary for ICE, recently stated that, "Worksite enforcement actions target a key component of the illicit support structure that enables illegal immigration to flourish. No employer, regardless of industry or location is immune from complying with the nation's laws. ICE and our law enforcement partners will continue to bring all of our authorities to bear in this fight …." As part of this broad-reaching initiative, ICE has increased the penalties for those employers found liable, including seizure of assets, criminal sanctions against human resource managers and executives, and harsh monetary fines. Long gone are the days when hiring illegal workers meant little but relatively low administrative fines. Now, in addition to the stiffer penalties, employers raided by ICE face legal costs, potential loss of workforce, interruption of business and negative publicity.

With an estimated 12 million undocumented persons in this country and the inexact science of employment verification, any type of business — particularly those employing low to mid-skilled workers — may be investigated. Certain industries, such as manufacturing, hospitality, agriculture, and construction, are thus more susceptible to raids. But the message from ICE is clear — no employer is immune. Indeed, even those who unintentionally hire illegal workers may be investigated and raided.

Complicating this situation is confusion surrounding which documents are proper for I-9 employment verification purposes. The current form itself is outdated — listing some documents that are no longer valid for employment verification purposes according to revised regulations. For example, certificates of U.S. citizenship or naturalization are no longer acceptable documents under "List A" of the I-9 form. On the other hand, the Immigration and National Act (INA) and amendments prohibit "document abuse" – meaning employers cannot ask for more documents from a new hire than those listed on Form I-9.

While trying to weed out unlawful workers, human resource professionals also face the risk of exposing the employer to potential discrimination claims under the INA or Title VII. Zealous attempts to verify an employee's work authorization documents can be perceived as unfairly targeting foreign nationals because of their race or nationality. *See Zamora v. Elite Logistics, Inc.,* No. 04-3205 (10th Circuit Feb. 26, 2007) (slim majority court holding that human resource manager did not discriminate against Hispanic worker by repeatedly asking for verification of social security number where worker had provided proof of legal ability to work in U.S.). Compare with *Zamora v. Elite Logistics, Inc.,* 449 F.3d 1106 (10th Cir. 2006) (holding that evidence suggested that manager had discriminatory motive for continuing to press the worker--who was a U.S. citizen--for confirmation of his social security number).

To make matters worse, the proliferation of fake documents makes it difficult for employers to detect unauthorized workers. The automated employment verification system, the Basic Pilot Program, may not help in countering document fraud.

While there are no guarantees that your business will not be the target of an ICE investigation, there are some steps an employer can take to minimize the probability and the potential impact of a raid:

• Ensure that I-9 forms are properly completed for each employee.

• Confirm that forms are kept in a safe and secure place.

• Perform a self-audit of I-9 forms on file. Complete or make revisions as required, but do not pre-date any revision/addition.

• If copies of employment eligibility documents are kept, ensure that copies are uniformly retained for all employees irrespective of immigration status.

• Document all reasonable and lawful efforts to resolve any employment verification issues, such as a new hire's failure to produce documents within the first three days of work, receipt of social security mismatch letters or reports of unauthorized workers. Follow up within a reasonable period of time.

• Ensure that independent contractors adhere to employment verification procedures as part of the contracting agreement.

As more employers are held accountable for the unauthorized workers in this country, raids will continue to increase. But maintaining the proper steps now should protect your business and reputation – and curb your potential liability in the long run.

For more information contact Elena Park at 610-941-2359 or epark@cozen.com.

NEW OSHA RULING SUBSTANTIALLY LIMITS G.C. LIABILITY FOR THE SAFETY VIOLATIONS OF THEIR SUBS

In a major shift in policy, the Occupational Safety and Health Review Commission [“the Commission”] recently struck down a substantial portion of the Occupational Safety and Health Agency’s [“OSHA”] multi-employer worksite doctrine. Reversing over 30 years of enforcement precedent, on April 27, 2007, the Commission held, in *Secretary of Labor v. Summit Contractors, Inc.,* that OSHA’s policy of citing general contractor’s [“G.C.”] for the safety and health violations of their subcontractors, whether or not the G.C.’s own employees were exposed to that hazard, was untenable.

BACKGROUND:

By their very nature, construction sites are beehives of activity in a constant state of flux, as multiple employers work side by side, making changes to the site simultaneously. These work conditions make safety violations almost inevitable. In recognition of this reality, OSHA developed a "multi-employer worksite" doctrine, under which more than one employer could be held accountable for a single safety violation. Under this policy, the employer who "created" the violation, the one who "exposed" employees to the violation, as well as the one who "controlled" the site (typically the G.C.) were all subject to citation for a violation. The old policy motivated employers to seek corrective action for safety violations at a construction site, whether their employees had caused or were exposed to the hazard or not.

RULING:

In the *Summit* case, a general contractor on a dormitory construction project had been cited by OSHA for the scaffolding violations of one of its subcontractors. Although the G.C. did not create the hazard, and none of its employees were exposed to it, Summit was cited anyway, simply because it was the contractor who “controlled” the worksite, under OSHA's multi-employer worksite doctrine. The subcontractor was also cited for “creating” the hazard and “exposing” its employees to the hazard.

The Commission ruled that OSHA’s own regulations prevented them from holding a contractor liable simply for being the “controlling” employer on a worksite, and so vacated the citation. They reasoned that the plain language of 29 C.F.R. § 1910.12(a) was in conflict with OSHA’s policy, stating only that "Each employer shall protect . . . . each of his employees engaged in construction work by complying with the appropriate standards prescribed in this paragraph." The Commission held that because Summit’s own employees were not exposed to the fall hazard created by the subcontractor’s scaffolding violations, Summit had met its obligation under OSHA’s regulations to protect “each of his employees” from construction work safety hazards, and so could not be held accountable for the subcontractor’s violations.

PRACTICAL IMPLICATIONS:

Although the Summit ruling will be greeted by contractors as a long overdue change in policy, its practical effects may be limited. Multi-employer worksites are not common in general industry, so the ruling’s impact on other industries will be modest. In addition, OSHA compliance officers will now be highly motivated to seek evidence that one or more of the controlling employer’s workers was exposed to the safety hazard, thus allowing citation of the G.C. under traditional theories. OSHA has already started the appeals process, seeking to persuade the Eighth Circuit Court of Appeals that the Summit decision should be overruled. All general contractors, and other “controlling employers” on worksites should "stay tuned" for new developments.

In the meantime, this decision should bring welcome relief for both G.C.’s and subcontractors, as only the employer who created the hazard and those employers whose workers are exposed to the hazard should be cited. Thus, there should be (1) fewer citations issued against G.C.’s based on the work of their subcontractors; (2) fewer situations where a subcontractor will be held accountable (by contract) to indemnify and defend G.C.’s against such

citations; and (3) fewer situations where a subcontractor will be held liable for safety violations on aspects of the work that they themselves contracted out to their own subcontractors, as long as their own employees were not exposed to the hazard.

For more information contact Julie Pacaro, at 215-665-5548, or jpacaro@cozen.com.

WHAT BUSINESSES NEED TO KNOW ABOUT E-DISCOVERY

At the end of 2006, the Federal Rules of Civil Procedure, which govern all litigation in federal courts of the United States, were amended to include new provisions relating to the discovery of electronically-stored information. Electronically-stored information includes writings, drawings, graphs, charts, photographs, sound recordings, images and other data or data compilations stored in any medium from which information can be obtained. Fed.R.Civ. P. 34(a). These discovery rules, and similar rules in many state courts, will have an impact on businesses everywhere, because they will affect, and in most instances increase (perhaps dramatically) the cost of all litigation. By some estimates, businesses in the United States generated almost 20 trillion electronic documents last year. The cost of electronic discovery in commercial litigation in the United States last year is estimated to have been $2 billion. The new E-Discovery amendments are intended to address the discovery, in litigation, of electronically-stored information ("ESI"). Going forward, all businesses will need to understand what electronically-stored information is, and when the duty to preserve that information arises. In this context, it is extremely important for businesses to anticipate potential ESI retention problems and issues, and to determine the best ways to store and collect potentially relevant evidence. This means adopting and following document and information retention policies relating to your business's ESI, and asking the fundamental question: Do you really need to keep everything you are keeping?

Unfortunately, experience has shown that preserving, reviewing and producing ESI can be very expensive. Companies need to take measures to store ESI in a form that is the cheapest to both preserve and produce, and to eliminate ESI that need not be kept. Anticipating and preparing for these issues are the best and only ways to prevent the costs of E-Discovery from controlling the outcome of your case.

Accessibility of data is an important issue in electronic discovery. Accessible data is active data, routinely used data, or data that a company accesses for purposes of a lawsuit. Inaccessible data is deleted data, information on backup systems, and legacy data. Typically, it is least expensive to produce accessible data and significantly more expensive to produce inaccessible data. In discovery in litigation, a party will have the obligation to produce its relevant, accessible ESI, and to identify and describe ESI that was not searched and not produced. If the opposing party believes that information it needs is contained only in inaccessible data, it can seek the discovery of the inaccessible data, and the court will determine whether to order such discovery, and which side will pay for it.

The duty to preserve documents and information, including ESI, arises whenever litigation is reasonably anticipated, even if your business anticipates being a plaintiff in such litigation. When this occurs, potential parties to litigation need to issue a "litigation hold." A litigation hold refers to the need to preserve documents and information, whether maintained electronically or otherwise, for purposes of the litigation. Hard copy documents and electronically stored information that may contain information potentially relevant to the anticipated claim must be preserved. This is true even of attorney-client privileged documents and information. The duty to preserve is broader than the duty to produce. How does a litigation hold work? Typically, a business must suspend routine document and data destruction, save or suspend the recycling of back-up tapes, notify its archival facilities to suspend destruction and to preserve its ESI, and monitor compliance and send periodic updates and reminders of this obligation. Employees must be notified of the need to preserve information. These procedures must be put in place for as long as it takes to identify and preserve information that is relevant to the lawsuit.

In the context of electronic discovery, your information technology personnel will play a vital role. These individuals frequently will be named to testify, as corporate designees, about the existence of, and practices for retaining and destroying, electronically stored information.

Your IT personnel will need to work directly with your outside counsel. The potential sources of ESI include your Company's network servers, desktop computers, laptop computers, home computers of your employees which may have work-related data, back-up tapes, legacy systems, cell phones, voicemail, personal digital assistants such as blackberry's and palm pilots, along with floppy disks and DVDs.

What can you do to prepare for and control the costs associated with electronic discovery? Your company should develop a data management plan which is supported by corporate leadership, and should prepare a written document and information retention policy relating to electronic and paper records. You should monitor and enforce compliance with this retention policy. You should document the ownership of all of your computer and network hardware, along with its location. When an employee terminates or transfers, you should ensure proper documentation and retention, as necessary, of his or her sources of electronic data. You should consider establishing a records management department, and developing an in-house litigation response team, which includes your IT personnel, so that you will be prepared when litigation strikes. Do not keep excessive back-up tapes. Limit the sizes of your employees' mail boxes and home directories. Seriously consider investing in software that enables you to standardize collection procedures and protocols for your electronically stored information.

We have all heard horror stories about huge fines or verdicts against companies that have failed to manage their E-Discovery obligations appropriately. Preparation is the best defense.

For more information contact Sarah Kelly at 215-665-5536 or skelly@cozen.com.

COZEN O'CONNOR

DIRECTORY OF OFFICES

PRINCIPAL OFFICE: PHILADELPHIA
1900 Market Street
Philadelphia, PA 19103-3508
Tel: 215.665.2000 or 800.523.2900
Fax: 215.665.2013
For general information please contact:
Joseph A. Gerber, Esq.

ATLANTA
Suite 2200, SunTrust Plaza
303 Peachtree Street, NE
Atlanta, GA 30308-3264
Tel: 404.572.2000 or 800.890.1393
Fax: 404.572.2199
Contact: T. David Higgins, Jr., Esq.

CHARLOTTE
Suite 2100, 301 South College Street
One Wachovia Center
Charlotte, NC 28202-6037
Tel: 704.376.3400 or 800.762.3575
Fax: 704.334.3351
Contact: T. David Higgins, Jr., Esq.

CHERRY HILL
Suite 300, LibertyView
457 Haddonfield Road, P.O. Box 5459
Cherry Hill, NJ 08002-2220
Tel: 856.910.5000 or 800.989.0499
Fax: 856.910.5075
Contact: Thomas McKay, III, Esq.

CHICAGO
Suite 1500, 222 South Riverside Plaza
Chicago, IL 60606-6000
Tel: 312.382.3100 or 877.992.6036
Fax: 312.382.8910
Contact: James I. Tarman, Esq.

DALLAS
2300 Bank One Center, 1717 Main Street
Dallas, TX 75201-7335
Tel: 214.462.3000 or 800.448.1207
Fax: 214.462.3299
Contact: Lawrence T. Bowman, Esq.

DENVER
707 17th Street, Suite 3100
Denver, CO 80202-3400
Tel: 720.479.3900 or 877.467.0305
Fax: 720.479.3890
Contact: Brad W. Breslau, Esq.

HOUSTON
One Houston Center
1221 McKinney, Suite 2900
Houston, TX 77010-2009
Tel.: 832.214.3900 or 800.448.8502
Fax: 832.214.3905
Contact: Joseph A. Ziemianski, Esq.

LOS ANGELES
Suite 2850
777 South Figueroa Street
Los Angeles, CA 90017-5800
Tel: 213.892.7900 or 800.563.1027
Fax: 213.892.7999
Contact: Mark S. Roth, Esq.

LONDON
9th Floor, Fountain House
130 Fenchurch Street
London, UK
EC3M 5DJ
Tel: 011.44.20.7864.2000
Fax: 011.44.20.7864.2013
Contact: Richard F. Allen, Esq.

MIAMI
Wachovia Financial Center
200 South Biscayne Boulevard,
Suite 4410, Miami, FL 33131
Tel: 305.704.5940 or 800.215.2137
Contact: Richard M. Dunn, Esq.

NEW YORK
45 Broadway Atrium, Suite 1600
New York, NY 10006-3792
Tel: 212.509.9400 or 800.437.7040
Fax: 212.509.9492
Contact: Michael J. Sommi, Esq.

909 Third Avenue
New York, NY 10022
Tel: 212.509.9400 or 800.437.7040
Fax: 212.207.4938
Contact: Michael J. Sommi, Esq.

NEWARK
Suite 1900
One Newark Center
1085 Raymond Boulevard
Newark, NJ 07102-5211
Tel: 973.286.1200 or 888.200.9521
Fax: 973.242.2121
Contact: Kevin M. Haas, Esq.

SAN DIEGO
Suite 1610, 501 West Broadway
San Diego, CA 92101-3536
Tel: 619.234.1700 or 800.782.3366
Fax: 619.234.7831
Contact: Joann Selleck, Esq.

SAN FRANCISCO
Suite 2400, 425 California Street
San Francisco, CA 94104-2215
Tel: 415.617.6100 or 800.818.0165
Fax: 415.617.6101
Contact: Joann Selleck, Esq.

SANTA FE
125 Lincoln Avenue, Suite 400
Santa Fe, NM 87501-2055
Tel: 505.820.3346 or 866.231.0144
Fax: 505.820.3347
Contact: Harvey Fruman, Esq.

SEATTLE
Suite 5200, Washington Mutual Tower
1201 Third Avenue
Seattle, WA 98101-3071
Tel: 206.340.1000 or 800.423.1950
Fax: 206.621.8783
Contact: Jodi McDougall, Esq.

TRENTON
144-B West State Street
Trenton, NJ 08608
Tel: 609.989.8620
Contact: Jeffrey L. Nash, Esq.

TORONTO
One Queen Street East, Suite 1920
Toronto, Ontario M5C 2W5
Tel: 416.361.3200 or 888.727.9948
Fax: 416.361.1405
Contact: Christopher Reain, Esq.

WASHINGTON, DC
The Army and Navy Building
Suite 1100, 1627 I Street, NW
Washington, DC 20006-4007
Tel: 202.912.4800 or 800.540.1355
Fax: 202.912.4830
Contact: Barry Boss, Esq.

WEST CONSHOHOCKEN
Suite 400, 200 Four Falls Corporate Center
P.O. Box 800
West Conshohocken, PA 19428-0800
Tel: 610.941.5400 or 800.379.0695
Fax: 610.941.0711
Contact: Ross Weiss, Esq.

WILMINGTON
Suite 1400, Chase Manhattan Centre
1201 North Market Street
Wilmington, DE 19801-1147
Tel: 302.295.2000 or 888.207.2440
Fax: 302.295.2013
Contact: Mark E. Felger, Esq.

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