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Navigating E-Discovery In Employment Litigation: Part 1

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This article from Lexis Practice Advisor provides guidance for employers on how to plan for, conduct and respond to electronic discovery in employment litigation. Given the prevalence of electronic data and the myriad ways in which it is stored, combined with the shifting landscape of federal discovery rules, it is critical that attorneys and employers educate themselves on the rules and practical implications regarding electronically stored information, or ESI, and e-discovery.

Employment litigation presents unique discovery challenges because, among other reasons, the employer controls and/or possesses nearly all relevant evidence. Indeed, emails contained in the employer company's email system may be the only contemporaneous record of the facts and the opinions expressed about the issues in dispute. Further, the employer's burden is often large because relevant data and documents may be dispersed among various business units of a company, and it is often difficult to identify and gather this information until more is known about the plaintiff and the claims. This article aims to make the e-discovery process for employment litigation easier and more cost-effective by providing practical guidance on the key issues in handling ESI.

This is part one of a two-part e-discovery article. Part one addresses the following issues (among others) concerning ESI and e-discovery in employment litigation:

- When does the obligation to preserve ESI arise?;
- What is a litigation hold notice and what should it say?;
- Creating a data source catalog or data map; and
- How should employers address ESI issues in connection with the meet and confer conference required under Rule 26(f) of the Federal Rules of Civil Procedure?

Part two addresses the following issues (among others) concerning ESI and e-discovery in employment litigation:

- What ESI must employers produce under FRCP 26 and 34?;
- How do bring-your-own-device policies affect ESI preservation and collection?;
- What are strategies for limiting the scope of the employer's ESI production?;
- What are best practices for handling privileged electronic communications?;
- Can the employer shift the cost of ESI production to the employee under FRCP 26(c)?;

- What are the best strategies for obtaining ESI from employees?; and
- What are potential sanctions for spoliation of ESI?

When Does the Obligation to Preserve ESI Arise?

The duty to preserve ESI arises "[o]nce a party reasonably anticipates litigation."[1]

The point when litigation becomes "reasonably anticipated" can depend on a variety of factors, but some actions — such as an employee filing a charge with the U.S. Equal Employment Opportunity Commission — clearly trigger the duty to preserve.[2] Likewise, an employee's specific request for documents can trigger an obligation to preserve those documents regardless of whether the employer believes that the employee is able to bring a claim.[3] Further, an employer's obligation to preserve ESI undoubtedly attaches if an employee threatens a lawsuit.[4]

As discussed in detail below, once the obligation to preserve ESI arises, you should advise the employer to:

- Issue a litigation hold notice; and
- Consider creating a data source catalog or data map.

What Is a Litigation Hold Notice and What Should it Say?
A litigation hold is a written request to preserve evidence, including documents and information stored in electronic form. The litigation hold is usually drafted and sent by the employer's in-house or outside counsel to the employer and its employees. Such a notice may also be sent directly by counsel to the opposing party or counsel.

In the litigation hold letter, you should:

- Describe the nature of the (anticipated) litigation and all criteria detailing the information to be preserved;
- Identify likely locations of relevant information;
- Outline steps to be taken for preserving the information; and
- Convey the significance of the obligation to the recipients.

When Should the Employer Issue a Litigation Hold Notice?

Generally, an employer should issue a litigation hold notice when, based on the known facts and circumstances, it knows of (or reasonably anticipates):

- A lawsuit or other dispute, claim or contested matter that has been (or will be) commenced by or against the employer;

- A subpoena or other request for documents or information that has been (or will be) directed to the employer; or

- A formal or informal regulatory investigation that has been (or will be) commenced against the employer.[5]

To Whom Should the Employer Issue a Litigation Hold Notice?

Based on the circumstances, advise the employer to send a litigation hold letter to:

- Key witnesses;
- Data custodians;
- Human resources;
- Records management;
- Information technology departments; and
- Possibly others in the organization — depending on their roles and/or relationship to the claims and/or potential defenses to the claims.

The employer should also consider sending a litigation hold letter to opposing counsel and/or its former employee.

Creating a Data Source Catalog or Data Map

Once the duty to preserve arises, consider asking the employer to create a data source catalog (or a data map) as a guide regarding key data systems that may be subject to litigation holds. This document will help you review and understand where and how ESI sits on the employer's systems. The process of creating this document (also called data mapping) may be performed by in-house IT personnel with or without assistance from outside consultants. In-house counsel also should be involved to help flag specific types of high-priority ESI that may have been the subject of prior discovery demands.

This catalog/data map can be a compilation of fact sheets on key data sources likely to be relevant across multiple litigations and investigations. There may be a core set of applications typically involved in the routine cases and more specialized systems and applications that need to be analyzed for more complex matters.

Typical categories for a data source catalog/data map include information relating to:

- Data sources;
- Business areas;
- Key contacts;
- Key functionalities;
- Data ranges;
- Retention policies;
- Data preservation; and
- Backup schedules.

Ultimately, through the process of data mapping, you should be able to identify:

- The locations of ESI.
- Who is responsible for ESI.
- Which employees and staff interact with ESI systems.
- External systems and storage locations.

- Employee interactions that affect ESI, such as the ability of employees to save their emails locally.
- Existing active data retention policies.
- Existing backup data retention policies.

Document Retention Policies

You should discover, either through data mapping or by simply asking the employer, the extent to which the employer has data and document retention policies and record retention schedules. A document retention policy and the accompanying record retention schedules describe the records that a company's employees should keep, sets forth the length of time for which documents should be retained, often includes instructions for where and how to keep different files, and sometimes describes the types of files the company should not retain at all. Such policies and schedules are useful to help protect the employer from subsequent claims of spoliation during an employment litigation.

Among other things, a document retention policy and the accompanying record retention schedules should:

- Provide for regular review of files to determine whether the company should retain or dispose of particular documents.

- Provide for the retention of all documents relating to claims or litigation against the company or subject to a court order.

- Provide for the retention of documents and ESI for at least the length of any relevant statute of limitations. As an example, Section 1602.14 of the U.S. Department of Labor regulations requires that "[a]ny personnel or employment record ... shall be preserved by the employer for a period of one year from the date of the making of the record or the personnel action involved, whichever occurs later."[6]

An employer should be especially mindful of challenges surrounding the preservation and collection of data for terminated or former employees. The employer should ensure good communication among its HR, IT and records management departments so that any requirement to retain data of a terminated employee is captured. The employer should consider establishing a protocol whereby its IT department confirms with its records management or HR department before wiping a hard drive, recycling a laptop computer, or deleting an email box for a terminated employee. An increasingly sensitive area for businesses is the conflict between the employer's desire to redeploy the laptops or workstations of employees who leave the company and the need to preserve potentially relevant data.

In addition to these general guidelines, an organization should also consider relevant laws or regulations requiring the preservation of certain types of data; some heavily regulated industries may face specialized rules governing the retention of electronic data.

How Should Employers Address ESI Issues in Connection With the Meet and Confer Conference Required under Rule 26(f) of the Federal Rules of Civil Procedure?

This section addresses Federal Rule of Civil Procedure 26(f) meet and confer conferences and ESI issues

to address during these conferences.

Rule 26(f) Meet and Confer Requirement

Under Federal Rule of Civil Procedure 26(f)(1), unless the court orders otherwise, the parties must "meet and confer" at least 21 days before a scheduling conference is to be held or a scheduling order is due under Federal Rule of Civil Procedure 16(b). Prior to the conference, you should become familiar with the employer's information systems and create an organized "discovery plan" for discussion with opposing counsel. In addition to being required by the rules, these discussions can help limit unnecessary discovery disputes and motion practice, as well as head off potential motions for sanctions alleging failure to properly preserve ESI. Moreover, well-informed counsel will be better equipped to convince the court and opposing parties of the reasonableness of their position, while also building credibility and avoiding costly over-preservation or production.

The discovery plan should map out the evidence you need to prevail on each of the elements of the claims and defenses. By doing this up front, you will avoid realizing long into the case that you have failed to request discovery on a topic relevant and material to the employment litigation. As the case proceeds and you gather evidence, update your discovery plan to see what you have obtained, what you are still missing, and whether you have learned of new topics of discovery that you had not been able to foresee at the outset.

During the meet and confer conference with opposing counsel, you should discuss the following issues:

- Discovery topics and schedule;
- Key personnel likely to have discoverable information;
- Identification of accessible and inaccessible sources of ESI, as well as the burden and cost associated with retrieving and reviewing such information;
- Preservation of ESI;
- Form (or forms) in which ESI will be produced (including metadata), as well as any unique data types or proprietary software involved;
- ESI collection and review protocol, including date limitations, deduplication, search terms and/or predictive coding (technology assisted review);
- Protocols for addressing privilege and work product; and
- Protocols for confidentiality or privacy concerns (particularly data privacy laws and protective orders) with respect to potential exchange of ESI.

Failure to adequately prepare for and engage in discussions with opposing counsel regarding e-discovery and the preservation, review and production of ESI can damage your credibility and the employer's interests in subsequent discovery disputes.[7]

Sedona Conference Principles and Guidelines

Federal courts have widely relied on the work of the Sedona Conference, a nonprofit legal policy organization that sponsors working groups composed of experts.[8] The Sedona Conference has published commentaries on, and guidelines for, electronic discovery that provide attorneys and employers guidance in preparing for the Rule 26(f) conference, and e-discovery issues in general.[9]

Keep the following eleven Sedona Conference principles in mind while assisting employers with an e-discovery process:

Principle 1: An e-discovery process is not required to be perfect, or even the best available, but it should be reasonable under the circumstances. When evaluating the reasonableness of an e-discovery process, parties and the court should consider issues of proportionality, including the benefits and burdens of a particular process.

Principle 2: An e-discovery process should be developed and implemented by a responding party after reasonable due diligence, including consultation with persons with subject-matter expertise, and technical knowledge and competence.

Principle 3: Responding parties are best situated to evaluate and select the procedures, methodologies and technologies for their e-discovery process.

Principle 4: Parties may reduce or eliminate the likelihood of formal discovery or expensive and time-consuming motion practice about an e-discovery process by conferring and exchanging nonprivileged information about that process.

Principle 5: When developing and implementing an e-discovery process, a responding party should consider how it would demonstrate the reasonableness of its process if required to do so. Documentation of significant decisions made during e-discovery may be helpful in demonstrating that the process was reasonable.

Principle 6: An e-discovery process should include reasonable validation.

Principle 7: A reasonable e-discovery process may use search terms and other culling methods to remove ESI that is duplicative, cumulative or not reasonably likely to contain information within the scope of discovery.

Principle 8: A review process can be reasonable even if it does not include manual review of all potentially responsive ESI.

Principle 9: Technology-assisted review should be held to the same standard of reasonableness as any other e-discovery process.

Principle 10: A party may use any reasonable process, including a technology-assisted process, to identify and withhold privileged or otherwise protected information. A party should not be required to use any process that does not adequately protect its rights to withhold privileged or otherwise protected information from production.

Principle 11: Whenever possible, a dispute about an e-discovery process should be timely resolved through informal mechanisms, such as mediation between the parties and conferences with the court, rather than through formal motion practice and hearings.[10]

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[1] Zubulake v. UBS Warburg LLC, 229 F.R.D. 422, 431 (S.D.N.Y. 2004); see also Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec. LLC, 685 F. Supp. 2d 456, 461 (S.D.N.Y. 2010); 29 C.F.R. § 1602.14 (requiring preservation of "evidence [that] may be relevant to future litigation").

[2] See Goonewardena v. State Workers Comp. Bd., 258 F. Supp. 3d 326, 348 (S.D.N.Y. 2017).

[3] See Vasser v. Shulkin, 2017 U.S. Dist. LEXIS 193174, at *6–7 (D.D.C. Nov. 22, 2017).

[4] See Snider v. Danfoss LLC, 2017 U.S. Dist. LEXIS 107591, at *13 (N.D. Ill. July 12, 2017) (holding that the duty to preserve plaintiff's emails was "obvious" because the plaintiff "had threatened to sue").

[5] See Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 216 (S.D.N.Y. 2003) ("Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a 'legal hold' to ensure the preservation of relevant documents."). See also Fed. R. Civ. P. 37, Advisory Committee Notes, 2015 Amendment ("Courts should consider the extent to which a party was on notice that litigation was likely and that the information would be relevant. A variety of events may alert a party to the prospect of litigation. Often these events provide only limited information about that prospective litigation, however, so that the scope of information that should be preserved may remain uncertain.").

[6] 29 C.F.R. § 1602.14 (as amended in 2012).

[7] See, e.g., Bailey v. Brookdale Univ. Hosp. Med. Ctr., 2017 U.S. Dist. LEXIS 93093, at *14–17 (E.D.N.Y. June 16, 2017) (criticizing plaintiff's attorney in employment case for failing to scrutinize discovery agreement proposed by defendant before agreeing to it, and refusing to allow plaintiff to rescind agreement despite cost of e-discovery inadvertently undertaken); Beard Research Inc. v. Kates, 981 A.2d 1175, 1187 (Del. Ch. 2009) (cautioning that "if the parties do not focus on the handling of e-discovery in the early stages of a case, the Court is not likely to be sympathetic when, for example, one party later complains that stringent measures were not instituted voluntarily by her adversary to ensure that no potentially relevant information was lost.").

[8] See Javeler Marine Servs. LLC v. Cross, 175 F. Supp. 3d 756 (S.D. Tex. 2016).

[9] See Life Plans Inc. v. Sec. Life of Denver Ins. Co., 52 F. Supp. 3d 893, 904 (N.D. Ill. 2014) ("Although Rule 26(f) does not require parties to address the cost of processing ESI in their discovery plan, the parties are well advised to follow the Sedona Conference's best practices and discuss the burden of producing ESI and the possibility of cost sharing at the 'meet and confer' conference.") (citing Sedona Conference Commentary on Non-Party Production & Rule 45 Subpoenas, 9 Sedona Conf. J. 197, 201 (2008)).

[10] A Project of The Sedona Conference Working Group on Electronic Document Retention & Production (WG1) September 2016 Public Comment Version.