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Navigating E-Discovery In Employment Litigation: Part 2

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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.

Part two of this two-part e-discovery article 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 Federal Rule of Civil Procedure 26(c)?;
- What are the best strategies for obtaining ESI from employees?; and
- What are potential sanctions for spoliation of ESI?

Part one of this article 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?

What ESI Must Employers Produce Under FRCP 26 and 34?

This section addresses key ESI that employers must produce to employees.

Initial Disclosures

FRCP 26 and 34 govern the parties' discovery (including e-discovery) obligations. Pursuant to FRCP 26(a)(1) (Initial Disclosure), the parties must provide each other with certain basic information even before receiving a discovery request, including a "copy — or a description by category and location — of all documents, *electronically stored information*, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment."[1]

Because of the cost and time involved in document collection, review and production, it would be highly unusual for a party, especially an employer, to produce copies of "all documents" it "may use to support its claims or defenses" as part of its initial disclosures. Instead, Rule 26(a)(1) is alternatively satisfied when the parties exchange a "description by category and location" of such documents. Therefore, consider advising the employer to follow this alternative approach regarding initial disclosures.

Broad Scope of Discovery Under FRCP 26(b)(1)

FRCP 26(b)(1) sets forth the broad scope of discovery:
Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

Because the discovery rules allow for liberal discovery, you should prepare the employer in advance regarding the estimated costs of collection, review and production.

Proportionality Under FRCP 26(b)(1)

The broad and liberal scope of federal discovery is tempered somewhat by the requirement that discovery must be "proportional to the needs of the case …" FRCP 26(b)(1) specifically lists the following factors for determining whether a discovery request is "proportional":

- The importance of the issues at stake in the action.
- The amount in controversy.
- The parties' relative access to relevant information.
- The parties' resources.
- The importance of the discovery in resolving the issues.

- Whether the burden or expense of the proposed discovery outweighs its likely benefit.

The proportionality limit on discovery is likely to come into play when a plaintiff-employee makes requests that place a burden on a defendant-employer, such as a request for voluminous documents, or a request that would require a defendant-employer to engage in a time-consuming search. However, proportionality cuts both ways, and the renewed focus on proportionality — renewed in that proportionality has always been embedded in the rules — also applies when employers seek documents that place burdens on employees.

Courts are taking the renewed focus on proportionality in FRCP 26(b)(1) to heart and parties are increasingly availing themselves of, or defending themselves against, proportionality arguments. As such, there are some early lessons from proportionality cases:

- Be prepared to make request-specific burden and proportionality arguments. Courts seem inclined to conduct a request-by-request proportionality and burden analysis.[2] Therefore, you should identify specific documents/categories of documents for which production will be burdensome and not proportionate to the case's needs.

- Likewise, consider less burdensome alternatives to responding to discovery requests and be ready to present those to opposing counsel and the court.[3]

- Find opportunities to agree: Courts continue to urge compromise on discovery disputes. Accordingly, be prepared to find matters upon which you can agree with opposing counsel.

- Prepare to argue proportionality both as a stand-alone matter and in the broader context of relevance and necessity. Courts continue to consider relevancy and necessity — in addition to proportionality — when analyzing discovery burdens.[4] As a result, be ready to argue proportionality both as a stand-alone matter and in the broader context of relevance and necessity.

Responses and Objections to Document Requests Must Be Specific

Parties responding to production requests under FRCP 34 typically list a litany of objections and often fail to specify whether any of the stated objections will be relied on as grounds to withhold documents sought by the requesting party. However, amended FRCP 34 requires responding parties to state the specific grounds on which the party is objecting and whether any documents are being withheld based on a given objection. In Fischer v. Forrest,[5] Magistrate Judge Andrew Peck issued a "discovery wake-up call" to the bar, holding that the failure to follow FRCP 34's requirement to "state objections with specificity (and to clearly indicate whether responsive material is being withheld on the basis of objection) will be deemed a waiver of all objections …"

When resisting certain discovery based on undue burden or expense, it is important that the employer be able to support its arguments with specific facts — including, for example, time and expense estimates provided by data vendors and in-house information technology staff. You should review such estimates carefully and understand the underlying assumptions contained therein.

Relevant Data Sources in Employment-Related Litigation

To properly comply with discovery requests in employment litigation, you will often need to collect and review the following data sources and/or type of documents.

- Emails between an employee and management are often used offensively and defensively in employment cases. Emails may also provide evidence of employee misconduct or poor performance.

- Computer data: Internet records, printing records, copying or duplication records, telephone records, instant message or chat room records, and data recovered from an employee's work computer may all contain relevant information.

- Data from personal digital assistants, cell phones or "smartphones." These devices may provide a key source of data whether (or not) they were synced with an organization's email system.

- Text messages may also be a relevant source of discoverable ESI.[6]

- Personnel files: Information contained in personnel files is often relevant in employment litigation and, thus, care should be taken to identify and collect all the relevant information, as components of the personnel files may be spread across various offices and supervisors. Note, however, that employers may not need to produce portions of a supervisor's personnel file.[7]

- Operational data such as parking records, building entrance or egress records, video surveillance, computer log-on and log-off data, elevator access, and log-on data for individual software programs may be important in defending claims in employment litigation.

- Administrative materials such as training verifications and manuals, timekeeping, benefits, payroll, and performance information are frequently relevant in employment litigation. Employers often maintain the materials in different departments, rather than in a central location.

- Home computers or other personal devices: Employers sometimes may obtain discovery of information contained on a plaintiff's home computer or other personal devices. Depending on the circumstances, data from the home computers or other personal devices of other employees may also be relevant.

In addition to the data sources listed above, the "Pilot Project Regarding Initial Discovery Protocols for Employment Cases Alleging Adverse Action" by the Federal Judicial Center, or FJC, contains a very clear and concise list of relevant documents in the context of employment litigation.

Specifically, the FJC's guidance lists the following documents that a plaintiff employee should produce to an employer-defendant:

- All communications concerning the factual allegations or claims at issue in this lawsuit between the plaintiff and the defendant.

- Claims, lawsuits, administrative charges and complaints by the plaintiff that rely upon any of the same factual allegations or claims as those at issue in this lawsuit.

- Documents concerning the formation and termination, if any, of the employment relationship at issue in this lawsuit, irrespective of the relevant time period.

- Documents concerning the terms and conditions of the employment relationship at issue in this lawsuit.

- Diary, journal and calendar entries maintained by the plaintiff concerning the factual allegations or claims at issue in this lawsuit.

- The plaintiff's current resume(s).

- Documents in the possession of the plaintiff concerning claims for unemployment benefits, unless production is prohibited by applicable law.

- Documents concerning (1) communications with potential employers; (2) job search efforts; and (3) offer(s) of employment, job description(s), and income and benefits of subsequent employment. The defendant shall not contact or subpoena a prospective or current employer to discover information about the plaintiff's claims without first providing the plaintiff 30 days' notice and an opportunity to file a motion for a protective order or a motion to quash such subpoena. If such a motion is filed, contact will not be initiated, or the subpoena will not be served until the motion is ruled upon.

- Documents concerning the termination of any subsequent employment.

- Any other document(s) upon which the plaintiff relies to support the plaintiff's claims.[8]

In addition, the FJC guidance lists the following documents that a defendant-employer should produce to a plaintiff-employee:

- All communications concerning the factual allegations or claims at issue in this lawsuit among or between (1) the plaintiff and the defendant, (2) the plaintiff's manager(s), and/or supervisor(s), and/or the defendant's human resources representative(s).

- Responses to claims, lawsuits, administrative charges and complaints by the plaintiff that rely upon any of the same factual allegations or claims as those at issue in this lawsuit.

- Documents concerning the formation and termination, if any, of the employment relationship at issue in this lawsuit, irrespective of the relevant time period.

- The plaintiff's personnel file, in any form, maintained by the defendant, including files concerning the plaintiff maintained by the plaintiff's supervisor(s), manager(s) or the defendant's human resources representative(s), irrespective of the relevant time period.

- The plaintiff's performance evaluations and formal discipline.

- Documents relied upon to make the employment decision(s) at issue in this lawsuit.

- Workplace policies or guidelines relevant to the adverse action in effect at the time of the adverse action. Depending upon the case, those may include policies or guidelines that address:

    - Discipline;
    - Termination of employment;
    - Promotion;
    - Discrimination;
    - Performance reviews or evaluations;
    - Misconduct;
    - Retaliation; and
    - Nature of the employment relationship.

- The table of contents and index of any employee handbook, code of conduct, or policies and procedures manual in effect at the time of the adverse action.

- Job description(s) for the position(s) that the plaintiff held.

- Documents showing the plaintiff's compensation and benefits, which normally include retirement plan benefits, fringe benefits, employee benefit summary plan descriptions, and summaries of compensation.

- Agreements between the plaintiff and the defendant to waive jury trial rights or to arbitrate disputes.

- Documents concerning investigation(s) of any complaint(s) about the plaintiff or made by the plaintiff, if relevant to the plaintiff's factual allegations or claims at issue in this lawsuit and not otherwise privileged.

- Documents in the possession of the defendant and/or the defendant's agent(s) concerning claims for unemployment benefits unless production is prohibited by applicable law.

- Any other document(s) upon which the defendant relies to support the defenses, affirmative defenses and counterclaims, including any other document(s) describing the reasons for the adverse action.[9]

With respect to employment class action litigation, other potentially relevant categories of documents include employee complaint databases and investigation files, audit-related information, and evidence regarding challenged policies, practices, and procedures.

Keyword Searches and Responding to Requests for E-Discovery

Keyword searches are among the most common automated tools for fulfilling the obligation to conduct a diligent search for documents potentially responsive to a request for production. As technology in the e-discovery space continues its rapid development, there has been a great deal of discussion about the most effective, and most defensible, uses of keyword searches. Cooperation with an opposing party, of course, is one way to develop and structure keyword searches. In addition, there are many techniques or methodologies that may be useful in validating the effectiveness of keyword searches.

The key to developing and properly testing effective search terms is having a clear purpose for their use. If the purpose for the keyword search is to identify the “hot” documents for an investigation (i.e., the needle in the haystack), then the keyword search should focus narrowly on specific topics. If, however, the purpose is to create a cost-effective and defensible review population, then the keyword search should focus on capturing the relevant and material information from the larger volume of data collected. By contrast, if the search is for an initial collection of documents, it may be appropriate to use broad search terms in the first instance, and then employ narrower search terms later in the process to target documents that may be responsive to specific requests.

In addition, designing a keyword search requires constant balancing of the materiality of issues in a matter and the risk of being under- or over-inclusive. For example, a date range or time restriction will often be an appropriate way to exclude per se irrelevant information and avoid over-inclusion. Similarly, limiting the review population to information collected from company employees (custodians in e-discovery jargon) will also often be appropriate. Make any judgment call with an eye to maintaining the proportion between the cost of discovery and the information’s importance to the case. The standard for discovery is reasonableness — not perfection — and the same is true for the use of keyword searches in e-discovery.

How Do BYOD Policies Affect ESI Preservation and Collection?

Allowing employees to use their personal mobile devices, such as smartphones, tablets and handheld computers, is common in today’s workplace. Using their own devices for work provides employees the flexibility and convenience to conduct business while traveling to or from remote locations where company-owned equipment may not be available. An employer with a bring-your-own-device, or BYOD, policy faces a significantly increased chance that the data on its employees’ personal devices will be discoverable and subject to the same preservation requirements as other ESI — if the employees use their personal devices for work-related purposes.[10]

Accordingly, you should determine whether the employer has a BYOD policy and, if so, ensure that employees’ personal devices are identified as a potential source of relevant information as part of any litigation hold.

What Are Strategies for Limiting the Scope of the Employer’s ESI Production?

Plaintiff-employees often seek very broad discovery, which can be burdensome on employers, particularly large companies. Consider the following strategies for limiting the scope of an employer’s ESI production:

- Seek to place reasonable and proportional parameters around the ESI to be produced. For example, if the plaintiff was employed from 2010 to 2018 at a Chicago facility, seek to limit ESI collection and production to the time frame and geographic location associated with the plaintiff (e.g., emails from the Chicago servers for the period 2010 to 2018).

- Use keywords, along with geographic and time limitations, when searching the email of the plaintiff’s supervisor and/or comparators. For example, if the plaintiff’s poor performance often concerned the failure to follow up with a customer, use the customer’s name as a keyword. By contrast, using the plaintiff’s name as a keyword may be too broad and result in overbroad collection.

- If the plaintiff refuses to agree to the proposed parameters, consider offering opposing counsel a sampling of the requested data. Defer further discussions and potential agreements until after the plaintiff's counsel reviews and evaluates the sample.

What Are Best Practices for Handling Privileged Electronic Communications?

Reviewing and redacting privileged material is often a time-consuming part of discovery. Consider these suggestions for handing potentially privileged ESI:

- Obtain a list of the internal and external lawyers who may have been involved in the matter or provided legal advice to the employer. Use these lawyers' names and email addresses as keywords to flag potentially privileged documents. If many lawyers from the same law firm have provided services to the employer, consider using the domain name ("@lawfirm.com") as a keyword.

- Let the electronic discovery vendor know that you will want them to prepare a preliminary privilege log after review is complete. However, the preliminary log will likely need review and editing by the legal team.

- Consider entering into a protective order that includes a clawback waiver and language incorporating Rule 502(d) of the Federal Rules of Evidence. Rule 502(d) provides: "Controlling Effect of a Court Order. A federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court — in which event the disclosure is also not a waiver in any other federal or state proceeding."

Can the Employer Shift the Cost of ESI Production to the Employee Under FRCP 26(c)?

Courts continue to follow the "American Rule" regarding litigation costs, where parties are responsible for their own attorney's fees and expenses — unless there is an agreement between the parties or a statute requiring otherwise. Indeed, the prevailing party is entitled to recover its attorney's fees and costs from the other side in connection with most employment discrimination statutes.[11]

Regardless of whether there is an agreement or applicable statute, courts will consider shifting a party's ESI production costs to the other side if the discovery request is not proportional as required by FRCP 26 and/or as a discovery-related sanction.

To increase the chance that the court will shift ESI production costs to the employee, the employer should attempt to show the court that the requested data is expensive to collect and not likely to be informative and/or that the information requested is duplicative of already produced information.

The employer should also consider entering into a protective order that includes specific terms, including the time and place or allocation of expenses, for the disclosure of discovery. Finally, consider preparing a catalog listing instances of discovery abuse by the employee and seeking sanctions if merited.

What Are the Best Strategies for Obtaining ESI From Employees?

Employees typically possess much less information and documents than employers, but employers can and should seek information from employees. To maximize the employers' chances of obtaining ESI from employees, you should:

- Inquire of both the employer and the employee about the employee's use of devices and media during the applicable time period. For example, did the employee use only an employer-issued telephone/tablet/laptop or did the employee also use a personal device (even just occasionally)? Request responsive data from all such devices and media.

- Seek information about when and whether the employee deleted potentially responsive data from a personal device.

- Consider requesting responsive texts, instant messages and voicemail data. Consider also if social media posts or other information may be responsive to the matter.

What Are Potential Sanctions for Spoliation of ESI?

Amended FRCP 37(e) explicitly addresses potential sanctions with respect to the spoliation of ESI:
Failure to Preserve Electronically Stored Information. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

> (1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or
> (2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:
>
> > (A) presume that the lost information was unfavorable to the party;
> > (B) instruct the jury that it may or must presume the information was unfavorable to the party; or
> > (C) dismiss the action or enter a default judgment.

Under the amended rule, courts will likely not impose preclusive sanctions absent a showing that the offending party acted intentionally.[12]

Deliberate destruction, however, will generally result in a more serious sanction. In the employment litigation context, courts have either imposed adverse inference instructions or strongly considered doing so where the party — employee or employer — deliberately destroyed relevant documents after an obligation to preserve arose.[13]

To avoid the risk of being sanctioned in connection with ESI spoliation, you should work with the employer as early as possible to ensure that:

- They maintain appropriate record retention policies;
- Are made aware of potential (or actual) claims; and
- Issue timely and appropriate litigation holds.

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[1] Fed. R. Civ. P. 26(a)(1)(A)(ii) (emphasis added).

[2] See, e.g., Mora v. Comcast Corp., 2018 U.S. Dist. LEXIS 46736, at *5–6 (N.D. Cal. March 21, 2018) (plaintiff's requests for employer's correspondence with federal and state agencies relating to alleged violations of work-safety standards or its filings with the National Labor Relations Board were not proportionate to the needs of the case).

[3] See, e.g., Mora, 2018 U.S. Dist. LEXIS 46736, at *4–5 (limiting a request for all "[c]omplaints, charges, or litigation filed against Comcast in California for race, age, or national origin discrimination" to those cases concerning employees from the same age, race, national original and region of California as plaintiff).

[4] See, e.g., Fotualii v. GI Trucking Co., 2017 U.S. Dist. LEXIS 195251, at *2–3 (W.D. Wash. Nov. 27, 2017) (where plaintiff sought "documents, memorandums, internal communications, or copies of any law enforcement reports" regarding a theft in Miami that defendant believed was carried out by Cubans and Samoans, and plaintiff was a Samoan alleging wrongful termination based on race and national origin, the court concluded "that proportionality considerations weigh in favor of denying discovery" "[g]iven the information's minimal relevance to [plaintiff's] claims").

[5] 2017 U.S. Dist. LEXIS 28102, at *2–5 (S.D.N.Y. Feb. 28, 2017).

[6] See In re Pradaxa Prods. Liab. Litig., 2013 U.S. Dist. LEXIS 173674, at *63 (S.D. Ill. Dec. 9, 2013) ("The litigation hold and the requirement to produce relevant text messages ... applies to that space on employees' cell phones dedicated to the business which is relevant to this litigation.") (subsequent history omitted).

[7] See Liebold v. Ala. Great S. Ry., 2018 U.S. Dist. LEXIS 6574, at *8 (E.D. La. Jan. 16, 2018) (holding that defendant employer needed to produce only those portions of supervisor's personnel file relevant to the plaintiff's claims).

[8] See Federal Judicial Center, Pilot Project Regarding Initial Discovery Protocols for Employment Cases Alleging Adverse Action, 6–7 (November 2011).

[9] See Federal Judicial Center, Pilot Project Regarding Initial Discovery Protocols for Employment Cases Alleging Adverse Action, 7–9 (November 2011).

[10] See, e.g., Small v. Univ. Med. Ctr., 2014 U.S. Dist. LEXIS 114406, at *118–19 (D. Nev. Aug. 18, 2014) (recommending sanctions for defendant medical center's failure to put a litigation hold in place for employees' personal devices, which were used to send work emails, until 250 days after the plaintiff-employee initiated the action).

[11] See, e.g., Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k); the Age Discrimination in Employment Act, (see 29 U.S.C. § 216(b)); and the Americans with Disabilities Act, 42 U.S.C. § 12205.

[12] See, e.g., Storey v. Effingham Cty., 2017 U.S. Dist. LEXIS 93147, at *17 (S.D. Ga. June 16, 2017) (imposing "[l]imited sanctions" to redress the prejudice caused by defendants' negligent destruction of ESI, stopping short of imposing an adverse-inference jury instruction but still prohibiting the defendants from arguing that the ESI they destroyed would have been favorable to them); Living Color Enters. v. New Era Aquaculture Ltd., 2016 U.S. Dist. LEXIS 39113, at *17–18 (S.D. Fla. Mar. 22, 2016) (denying requested sanctions, including an adverse-inference instruction, where there was only "minimal" prejudice, if any, and the destruction of ESI was negligent, not intentional).

[13] See, e.g., Ottoson v. SMBC Leasing & Fin., Inc., 268 F. Supp. 3d 570 (S.D.N.Y. 2017) (imposing adverse inference sanction on plaintiff-employee who had failed to preserve or produce email communications with fact witnesses in which plaintiff-employee had apparently attempted to direct their testimony).