

Electronic Discovery & Records Management



Tip of the Month

E-Discovery in Employment Litigation

Scenario

The general counsel of a manufacturing company has received a complaint filed by an employee alleging employment discrimination and harassment on the basis of race and sex. The potential amount of damages is unknown at this point, and the general counsel seeks to minimize the costs of preserving, collecting, reviewing and producing electronically stored information (ESI) as part of the investigation and discovery processes.

Proportionality of Document Production in Single Plaintiff and Class Cases

Employment litigation, which may occupy as much as 25 percent of an organization's active litigation case load, presents discovery challenges because the employer controls nearly all of the relevant evidence. The employer's burden is large because relevant data and documents can touch every operational aspect of a company, and it is difficult to identify and gather this information until more is known about the plaintiff and the claims. Not only are employment records usually maintained exclusively by the employer, but emails contained in the company's email system, which is controlled by the employer, can be the only contemporaneous record of the facts and the opinions expressed about the issues in dispute. Because the cost of reviewing and producing the relevant data is often high relative to the potential damages at issue, employers sometimes settle cases early, even before an evaluation of merit is made.

Proportionality concerns are also present in employment class action lawsuits, in which discovery is typically one-sided. The employer is frequently a large organization with significant volumes of electronic data, while the plaintiffs are frequently a large group of unnamed individuals represented by a few named plaintiffs with a small amount of electronic data. As a result, the potentially exorbitant costs associated with discovery in an employment class action lawsuit fall almost exclusively on the employer. This situation can create disincentives for the parties to work together to resolve discovery disputes, and it poses the risk that the employer will face unfair pressure to settle.

Relevant Data Sources

The employer should first consider what data or documents are potentially relevant to the litigation and will be appropriate to include in a litigation hold and to consider for collection, review and production. Because of the nature of employment-related claims, relevant data can reside throughout the organization. Relevant data sources may include:

- **Emails:** 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 (PDAs), cell phones or "smart phones":** These devices may provide a key source of data if they were not synched with an organization's email system, and, even if they were synched, there may be communications between such devices that did not go through the email system. Text messages, if retained by the organization, may also be a relevant source of discoverable ESI.
- **Personnel files:** Information contained in personnel files is often relevant in employment litigation. Care should be taken to identify and collect all of the relevant information, as components of the personnel files may be spread across various offices and supervisors.
- **Operational data:** 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 data:** Administrative materials such as training verifications and manuals, timekeeping, benefits, payroll and performance information are frequently relevant in employment litigation. These materials are often maintained in different departments and not centrally located within the organization.
- **The plaintiff's home computer:** Defendants sometimes may obtain discovery of information contained on a plaintiff's personal or home computer.

In addition to the data sources listed above, employers should consider the data sources listed in the Federal Judicial Center's "Pilot Project Regarding Initial Discovery Protocols For Employment Cases Alleging Adverse Action" (November 2011), which introduced pretrial procedures for certain types of federal employment cases in order to encourage more efficient and less expensive discovery. These protocols, which are currently being tested in select US district courts, create a new category of information exchange, replacing initial disclosures with initial discovery specific to employment cases alleging adverse action.

Terminated Employees

An employer should be mindful of special challenges surrounding the preservation and collection of data for terminated or former employees. The employer should ensure good communication among its human resources (HR), information technology (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 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.

Conclusion

The burden of discovery falls disproportionately upon the employer in most employment litigation, but a resourceful employer can minimize the cost of discovery by familiarizing itself with the relevant data sources. Employers should remain alert to situations in which they may reasonably anticipate litigation—such as the departure of a terminated employee—in order to prepare to gather relevant data if needed.

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