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Employers Must Preserve Electronic Data Whenever They "Reasonably Anticipate" Employment Litigation

In a still-developing string of recent decisions, federal courts have created a new set of rules and requirements governing the conduct of employers and counsel related to electronic data, and its retention and discovery leading up to and during litigation. In an attempt to codify and universalize the rules established by these decisions, the Supreme Court adopted changes to the Federal Rules of Civil Procedure to address this subject, which went into effect on December 1, 2006. Some of these changes are quite significant. This article summarizes the new responsibilities on both employers and counsel created by these new rules and provides guidance for addressing electronic document retention and discovery in compliance with these new rules.

POSTED:

Jan 29, 2007

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I. Why You Care

In the past some employers viewed discovery as an annoyance they knew would come up during employment litigation, but one that would be handled primarily by their attorneys. Whether or not that was true in the past, the new rules related to electronic discovery have teeth and require both employers and counsel to be wary.

The new wave of electronic discovery decisions began with a series of related decisions in the *Zubulake* case, an employment case from the Southern District of New York. In addition to establishing the basic concepts and defining many of the new rules and responsibilities related to electronic discovery, in that case the judge, upon finding that the employer and its counsel failed to comply with these responsibilities, issued an adverse inference instruction to the jury against the employer. The judge instructed the jury that it could infer that destroyed e-mails, that the employer failed to retain and produce, would have said the damning things that plaintiff alleged they said. This instruction led to a $29 million verdict against the employer.

Even worse, in a subsequent case, a federal court in Florida issued a partial default judgment against the defendant for failure to retain and produce the contents of backup tapes. The court allowed the jury to decide only reliance and

damages, instructing it that all other elements of the claims were considered proven because of the discovery abuses, and further allowed the jury to consider the defendant's failure to comply with its electronic discovery obligations as evidence supporting punitive damages. This led to a $1.45 billion (that's not a typo) verdict against defendant.

These consequences dictate that employers must take these responsibilities seriously and be able to demonstrate a good faith effort to comply.

II. New Concepts

A. "ESI" - Electronically Stored Information

The new federal rules establish a new term, "ESI," which is short for "Electronically Stored Information." This term defines the scope of what is covered by the new rules relating to electronic discovery. While generally e-mail is the type of document most often considered with respect to electronic discovery, it is critical to understand that ESI is not limited to e-mail or even computer-created text documents. The new rules leave ESI intentionally broad to cover the full breadth of every type of information that can be created, transmitted or stored electronically. To give a sense of how broad is the sweep of this term, ESI includes (but is not limited to) e-mail, text documents, spreadsheets, databases, voicemail, text messages, cell phone call logs, server logs, configuration files, archives, contents of Treo, Blackberry, or PDA memory, magnetic imprints left on hard disks, and any other bit of data or information that is stored anywhere in electronic form. ESI also includes any metadata associated with any of these types of information.

B. "Accessible" vs. "Inaccessible" Data

The new rules discuss two categories of information: accessible and inaccessible. The duties that apply to each can be somewhat different. While the courts have not yet had a chance to interpret the rules and precisely define the contours of these categories, the general understanding at this point is that accessible information is any information either stored on active systems available for regular use or that can be recovered and searched in its current form without undue burden. Inaccessible information is information that, while still in existence, is not on active systems or available to be searched and discovered without some effort and reconstruction. Examples of inaccessible information include information stored on backup tapes that must be reconstructed before

searching, deleted files, or any information that requires forensic analysis to discover.

C. "Key Players"

Many of the new rules involve the issue of "key players." These are the individuals actually involved in the circumstances giving rise to a case, e.g., the people with specific knowledge of the relevant facts leading to an employee's discharge. The new rules apply different duties with respect to the key players (and any ESI associated with the key players) than the duties applicable with respect to the remainder of an employer's employees. The first step in complying with an employer's obligations under the new rules will be to identify the key players.

D. "Reasonably Anticipate Litigation"

All of the new duties of preservation and production begin when an employer " reasonably anticipates litigation." Until that line is crossed, there is no preservation obligation. An employer may adopt whatever policies it wishes with regard to the preservation or destruction of electronic information. There is no general obligation to keep anything, and the destruction of electronic evidence through good faith application of an electronic records retention/destruction policy may never be used against an employer provided the destruction occurred prior to the reasonable anticipation of litigation.

A party must reasonably anticipate litigation at the point the key players actually recognize the likelihood of litigation arising from a given circumstance, or are in possession of sufficient information such that a reasonable person would anticipate the likelihood of litigation. The courts have not yet had a chance to define precisely the limits of this concept through case law, but the standard given above is currently considered best practice until we have a better idea where different courts will come down. It is critical to note that this standard will often place the reasonable anticipation of litigation, and thus the start of preservation obligations, long before a party is served with a complaint, and possibly before a party even receives a pre-litigation demand letter from the future plaintiff. An employer, for example, will have to determine whether it "reasonably anticipates litigation" when an irate, just-terminated employee threatens "to sue the company" on the way out the door.

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III. The New Rules

A. Initiating the Litigation Hold

- As soon as an employer reasonably anticipates litigation, it is required to initiate a litigation hold. Imposing a litigation hold requires the following steps and duties applicable to both the employer and its outside counsel:
- The employer must suspend the operation of any automatic systems that archive or destroy ESI, including routine destruction of backup tapes and routine deletion or archiving of old files or e-mails.
- Counsel must interview IT personnel directly for the purpose of learning about the employer's systems and technological infrastructure.
- Counsel and the employer must identify the type, location and method of storage of all ESI retained by the employer.
- Counsel and the employer must identify the key players with respect to the litigation.
- Counsel must interview the key players to determine what ESI they may have or may have created in relation to the litigation, including specifically any personal storage of information: cell phone, PDA, laptop, home computer, personal workstation, discs, CDs, DVDs, flash drives, jump drives, etc.
- Counsel and the employer must specifically direct the litigation hold. This includes both a general instruction to avoid the destruction of any ESI that exists as of the date of the litigation hold or that is created subsequent to that date, and specific, personal instruction to the key players regarding the duty to retain and produce any ESI associated with those key players.

The new rules require compliance with each of these specific duties, and the duties apply equally to counsel and the employer, under threat of adverse instructions against the employer and/or monetary sanctions against either or both the employer and counsel.

With respect to what information must be retained and produced, the general rule is that any information must be retained if it is either: (i) known to be unique and relevant to the litigation; or (ii) created, viewed or retained by or on behalf of a key player, whether known to be relevant or not. An employer is not obligated

to retain everything, but it is obligated to retain anything that may fall into one of these two categories.

B. Production of ESI

Under the new rules, absent an agreement between the parties regarding production of ESI, the plaintiff/employee may specify the form of production, but may only require production in a single form. If the plaintiff does not specify a form of production, then the employer may choose the form and may produce the information as stored. Two limitations on this discretion appear to be developing. First, a party may not choose a form that strips metadata from the requested information (such as producing word documents in pdf form). Second, if a party chooses to produce information as stored, but the information requires a native environment to be accessed, the party may be required by the court to provide access to the native environment to allow the requesting party to access the information.

IV. Best Practice Procedures

While the new rules impose significant new duties that will require an approach tailored to each specific case and each specific party, the following steps represent a core, best-practice process for dealing with ESI:

1. Notify and involve counsel as soon as you are aware that there is any possibility that employment litigation may be coming. This gets ahead of the "reasonable anticipation" trigger.

2. Immediately upon notification of counsel, allow counsel to interview IT staff to understand the IT infrastructure.

3. Work together to identify key players and interview them as soon as possible.

4. Create a written plan outlining the scope of a litigation hold, the scope of information to be retained, the scope of systems that must be addressed and the scope of individuals who must be instructed.

5. Follow the plan to implement the litigation hold, instructing each individual personally.

6. Document all efforts to develop, implement and maintain the litigation hold. 7. As soon as litigation begins, communicate with opposing counsel to

agree on: (i) the scope of ESI that the parties will expect to be retained; (ii) the form of production of any ESI; and (iii) agreed procedures for retaining privilege for inadvertently disclosed ESI.