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Electronic discovery presents special challenges in employment litigation. It is critical for employers to understand these challenges, especially in light of the recent amendments to the Federal Rules of Civil Procedure.

E-Discovery: Three Major Challenges For Employers

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The December 1, 2006 amendments to the Federal Rules of Civil Procedure have focused intense attention on the burdens and risks of electronic discovery. Employment litigation magnifies those burdens and risks for reasons typically absent from other forms of litigation. Understanding the unique aspects of electronic discovery in employment litigation is critical to protecting an organization against a plaintiff's use of electronic discovery to obtain tactical advantages that could lead to an undesired settlement or an unwarranted and disproportionate jury verdict.

The Amendments To The Federal Rules Of Civil Procedure

The amendments to the federal rules are intended to accommodate the digitization of global business and, relatedly, of business-related litigation. The amended rules effectively mandate that litigants focus at the pre-trial stages of a lawsuit on the distinct issues raised by the storage of discoverable information in electronic form. The amendments effect the following changes to all types of civil litigation:

- Requiring that litigants discuss, at the outset of every lawsuit, issues related to the discovery of electronically stored information (ESI), including the steps taken to preserve ESI and the form in which ESI will be produced in discovery;
- Granting the party requesting production of documents the right to specify the form in which ESI should be produced, *i.e.*, in its "native" format or as an image file, such as a .pdf;

- Creating a framework for determining whether a party must produce inaccessible ESI, such as deleted data or data stored on back-up tapes, and, if so, how the cost of that production should be allocated;
- Establishing a procedure for asserting claims of privilege or work product protection after inadvertent production of privileged material; and
- Providing a "safe harbor" from sanctions for the destruction of ESI through the good faith, routine operation of computer systems.

While these changes primarily establish rules to be followed with respect to the disclosure of ESI after an employment lawsuit has been filed, they necessarily also have a substantial secondary influence on pre-litigation business conduct. Absent the proactive steps described below, these changes will permit plaintiff's counsel in employment litigation to shine a spotlight on the destruction of discoverable data and to take significant advantage of the "gigabyte disparity," *i.e.*, the substantial imbalance in the quantity of discoverable ESI maintained by employers vis-à-vis individual plaintiffs or the named representatives of a putative class.

Preventing Data Destruction That Means Trouble

Plaintiffs can take no advantage from an organization's destruction of data before a duty to preserve that information has attached; otherwise, organizations would be required to invest in virtually limitless storage capacity. However, as explained in the leading case on electronic discovery, *Zubulake v. UBS Warburg*

LLC, “Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a ‘litigation hold’ to ensure the preservation of relevant documents.” This mandate highlights a conundrum unique to employment litigation: When should an employer “reasonably anticipate litigation” from one of its employees and, therefore, have a duty to issue a litigation hold?

Employment relationships, like marriages, can be long lasting and prone to disputes of varying seriousness. Just as no one marital tiff means that divorce proceedings are imminent, not every job complaint, or even string of complaints, by an employee means that an employee is likely to bring suit. Nonetheless, a court retrospectively analyzing an employment dispute could easily find that litigation should have been reasonably anticipated long before a judicial complaint, or even an administrative charge, was filed.

In *Zubulake*, for example, the court held that the employer had a duty to preserve ESI beginning four months before the employee filed her EEOC charge because her co-workers were marking their e-mail exchanges “attorney-client privilege” (although no attorney was a party to the e-mails) and *Zubulake*’s supervisor subjectively feared that she would sue the company. The challenge of this holding for employers is that no one in the company in a position to implement a litigation hold was aware that *Zubulake*’s co-workers and supervisor anticipated litigation. Another recent federal court decision, *Broccoli v. Echostar Communications Corp.*, held that the employer had a duty to preserve ESI once the plaintiff complained to his supervisors about alleged harassment by a human resources administrator, which occurred more than one year before the employee finally filed an administrative charge.

These cases illustrate that even line supervisors must be aware of the possible need to preserve electronic evidence at all stages of an employment dispute. In addition, in-house counsel and human resources professionals need to continually analyze whether and when an on-going employee relations issue constitutes “notice” of potential litigation such that the employer must implement a litigation hold. An employer’s failure to timely implement a litigation

hold could set the stage for future sanctions based upon the destruction of evidence. On the other hand, prematurely implementing a litigation hold could cause unnecessary anxiety in the workplace and cause the organization to unnecessarily undertake the burdens of preserving ESI.

The Problem Of Continuous Generation Of Evidence

A second potentially vexing problem for employers, which is absent from most other forms of civil litigation, arises when an employee-cum-litigant continues as an employee after the duty to preserve has attached. In these circumstances, issuing a single litigation hold communication typically will not ensure that all potentially discoverable ESI is adequately preserved because co-workers, managers, and human resources professionals most likely will continue to generate discoverable electronic information after the initial communication of the litigation hold. This problem can be exacerbated in the context of a putative class action where many potential class members may continue to work for the employer.

The following guidelines can help to ensure that employers meet their obligations to preserve electronic evidence on an ongoing basis:

- **Identify key players.** Determine who within the organization is a key witness likely to be generating discoverable electronic data. These employees likely will be the plaintiff’s managers, human resources personnel with whom the plaintiff has contact and, depending on plaintiff’s allegations, payroll personnel. Explain to these key players their obligations to continue to preserve newly-created evidence. In addition, when identifying key players, do not overlook IT professionals who are responsible for ensuring that data is preserved.
- **Issue periodic reminders.** Litigation can be a slow process, and key players are likely to forget about their preservation obligations unless periodically reminded. In addition, periodic reminders will help ensure that new employees who may not be aware of the “history” that preceded the litigation hold understand their preservation obligations.

- **Make it easy to preserve.** Work with IT representatives or outside vendors to create ways to facilitate evidence preservation. For example, shared folders can be created to preserve newly-created, discoverable documents.
- **Make sure to label all ESI that is privileged!** When litigating against a current employee, an employer likely will store documents on its computer system that are protected from discovery by attorney-client privilege. If those documents are not conspicuously marked as attorney-client privileged, they may be inadvertently produced.

The “Gigabyte Disparity”

A third unique issue that employment litigation presents is the “gigabyte disparity.” Unlike in many other categories of civil litigation, in employment litigation the vast majority of discoverable ESI is likely in the possession of one party, i.e., the employer. This disparity puts employers at a disadvantage in two important ways.

First, electronic discovery can be costly. While the amended rules authorize courts to allocate to plaintiffs the potentially high cost of discovering inaccessible data, such allocations are relatively unlikely in employment litigation where the employee typically will be far less able to bear even a portion of the anticipated costs. Consequently, employees may be in a position to use this expense as a bargaining chip in settlement negotiations.

Second, because plaintiffs typically will not be required to themselves address the significant burdens of preserving and producing substantial electronic discovery, their counsel may be more willing to try to reap advantage from even minor missteps by the employer. Unlike in many other forms of litigation, in most employment cases the time-worn adage “what goes around comes around” simply does not apply with respect to electronic discovery.

The disadvantages of the “gigabyte disparity” can be mitigated to a certain extent. Employers can reduce the disparity by regularly purging electronic files in accordance with a legitimate records management system that employs a document destruction policy that was drafted and implemented before litigation is on the

horizon, and which is promptly suspended when litigation is anticipated. In addition, if the employee might possess discoverable data on a personal computer, the employer also can legitimately demand that the employee preserve potentially discoverable ESI. Forcing the employee to confront issues similar to those that the employer is facing may curb the appetite of the employee's counsel for taking advantage of the gigabyte disparity.

Employers can expect electronic discovery to raise additional challenges as the courts are called upon to interpret the recent amendments to the Federal Rules. In the meantime, employers should consider taking the steps described above to address the most salient challenges that electronic discovery raises.

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