



Electronic Dispatch

Labor and Employment Law Information Memo

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NEW E-DISCOVERY RULES PLACE A PREMIUM ON ELECTRONIC COMMUNICATION TRAINING

New amendments to the Federal Rules of Civil Procedure addressing discovery of electronically stored information took effect on December 1, 2006. Previously, courts were forced to apply discovery rules designed for paper-based discovery to the evolving world of electronic information. The amendments are designed to account for some of the unique issues that arise when dealing with electronic data.

Among other things, the amendments make it even easier for a party in litigation to obtain from its adversary electronic communications, including e-mails and other electronically stored documents (as well as their histories). These amendments place a premium on employers ensuring that their workforce is trained to understand the legal risks associated with e-mails and other electronic data and that they develop, and adhere to, an effective record retention policy for electronic as well as paper information.

E-Mail in the Workplace

E-mail has become the preferred means of communication in many workplaces. Studies estimate that in excess of 60 billion e-mail messages are transmitted in a business context every day. While e-mail has enhanced productivity for businesses, it carries with it many drawbacks. E-mail messages tend to be extremely informal. E-mails can be sent in a split second, without time to think carefully about what is being said, how it is being communicated, or how it will be received. As a result, employees tend to write things in e-mails that would never be said in person or included in a more formal writing. They do not take the time to think through the ramifications of what is being written. Further, employees often assume, incorrectly, that the e-mail is confidential and will only be available to the recipient, or that once "deleted" it is no longer retrievable. Typically, the fact that an e-mail might pop up in the context of a lawsuit months or years later never enters an employee's mind.

Unfortunately, the threat of litigation is always present for an employer, and the steady stream of informal e-mails zipping through an organization's information technology system can present real problems. The new e-discovery rules confirm that e-mails are discoverable in the course of litigation. Even though an employer has little or no control over what its employees are saying in their e-mails, it still must answer to those statements in a lawsuit. The highly informal nature of e-mail messages makes it more likely (as compared to other official company documents) that they will contain statements that could undermine an employer's position in litigation.

While employers may not be able to control completely what employees are writing in e-mails, it can provide training to help them appreciate the realities of e-mail, the prospects for discovery of e-mail communications and other electronic information during litigation, and the stakes involved. All workers who use e-mail must understand that virtually nothing is confidential, that almost everything is saved (in one sense or another), and that one day, anything they have sent or received could show up in a lawsuit. In addition, e-mail usage policies should be periodically updated by employers and regularly re-communicated to employees.



Retaining Electronic Information: Litigation Holds and Spoliation

The content of e-mail and other electronic communications is not the only issue about which employers need to be concerned. The prospect of e-discovery raises concerns over how records are retained. Employers need to create and follow an effective record retention policy applicable to both paper and electronic records. The policy should describe which records to maintain, where they should be saved, in what format, and for how long. Careful adherence to a policy will enable an employer to better defend against employment claims and reduce the risk of a “spoliation” finding in the course of litigation. Spoliation is the destruction, significant alteration, or failure to preserve evidence that a party has a duty to preserve. Courts can impose a number of sanctions on a party if spoliation has occurred. Certain witnesses may be prevented from testifying; adverse inferences may be allowed with regard to the missing evidence; the burden of proof could be shifted; and in the most severe cases, a default judgment may be entered against the spoliator. Any of these sanctions could seriously undermine an employer’s ability to defend itself in litigation. The first step to avoiding a finding of spoliation is to create and adhere to a record retention policy.

Creating and adhering to a record retention policy alone, however, will not prevent a spoliation finding. Once there is threatened or pending litigation, the duty to preserve evidence is heightened. At that point, a party must institute a “litigation hold.” All potentially relevant information (including e-mails and other electronic documents and their associated data) must be placed on hold to ensure that it is not destroyed, even if it is scheduled to be destroyed as part of a regularly scheduled deletion/destruction in a record retention policy. Managers and employees alike must be made aware of their responsibility to preserve e-mails and other electronic information that may be relevant to a lawsuit.

The amendments to the Federal Rules reinforce this point. Under the amended rules, the court will not impose sanctions for failing to produce electronically stored information that is lost due to a “routine, good-faith operation of an electronic information system.” At first glance, this might suggest that if the party, as part of its record retention policy, automatically deletes all e-mails of a certain age, it will not be sanctioned for failing to produce these e-mails in litigation. However, the “good faith” requirement in fact means that a party cannot let information be deleted as part of its regular policy if there is pending or reasonably anticipated litigation. In these cases, courts will expect parties to override their regular destruction policies and take affirmative steps to preserve potentially relevant information.

A recent case illustrates the potential scope of e-discovery and the duty to preserve evidence. In Easton Sports Inc. v. Warrior Lacrosse, Inc., 2006 Westlaw 2811261 (E.D. Mich. 9/28/06), the plaintiff sought sanctions against the defendant for the bad faith destruction of electronic information. The defendant had hired the plaintiff’s former employee. That employee had forwarded some of the plaintiff’s confidential documents to his personal Yahoo account before leaving the plaintiff’s employ. The plaintiff’s computer forensic expert determined that the employee had opened the confidential documents on his home computer. When the plaintiff commenced a lawsuit against the defendant employer, the employee, without the knowledge of the defendant, cancelled his Yahoo account, thereby destroying the e-mails and rendering them unrecoverable. The court found that the employee destroyed evidence of wrongfully obtained information when he cancelled the Yahoo account. The court also found that the defendant had negligently failed to preserve relevant evidence by failing to prevent the employee from cancelling the account and ruled that a negative inference could be drawn at trial because the defendant “should have done more to detect and preserve relevant data under the employee’s control.” This is a staggering standard – the employer had a duty to preserve information that the employee had misappropriated (without the employer’s knowledge) from another and which (also without the employer’s knowledge) had been stored on the employee’s home computer.

In today’s world of massive electronic information, with less information being duplicated in paper form, the responsibilities and risks associated with the potential discovery of electronic information are great. Employers must be ever vigilant to ensure that (a) employees are not increasing the risk of litigation by their use of e-mail and other electronic communication methods; and (b) electronic records are regularly retained to aid in the defense of any lawsuit and to avoid a charge of spoliation.

Training Program Available

To assist employers in managing this risk, BS&K has developed a training program geared to managers and supervisors. This program explains the litigation discovery process generally, so that managers and supervisors will understand the basics of how liability can be impacted by e-mail and other electronic communications. It also covers basic technology information, in plain English, so that your management team can understand what really lives and dies in cyberspace. Finally, it includes basic training on how an employer, and its managers and supervisors, need to respond when a threat of litigation is presented. Providing training in this area can be one of the most effective risk management tools you can implement in 2007.

For more information about BS&K's Electronic Communication Training Basics for Management, please contact your BS&K lawyer, or:

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