

Electronically Stored Information and Litigation in the 21st Century

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Electronically Stored Information (“ESI”) is prevalent in today’s world. We encounter it constantly with the increased use of e-mail, text messaging, social media, blogs, etc. We use it both at home and work. It is everywhere in our personal lives, our professional lives, and on our computers, smart phones, and tablets.

In a litigation context, ESI can be particularly troubling. It can be changed, modified, or deleted more easily than traditional physical documents. It can also be accessed and copied at any time by multiple people – often without the necessity of reporting it to anyone. Such acts can expose litigants to the possibility of sanctions ranging from admonishment or reprimand to dismissal of claims or default judgment.

This is particularly frightening for employers. Therefore, it is critical for employers to be mindful of this potential minefield and implement a Records Management Policy and Retention Schedule. Adhering to these may provide a safe harbor from sanctions related to loss or destruction of ESI that may be needed during litigation.

A proper ESI policy will establish procedures to preserve, catalog, find, and produce ESI that may be relevant to a dispute. In addition, the proper system will allow for a more efficient and less expensive search for ESI.

If an employer outsources any functions, such as accounting, payroll, web hosting, etc., this will have to be considered when developing ESI policies. In addition, any other entity (customers, suppliers, etc.) with which ESI is shared must also be included in the ESI management policies.

When litigation is anticipated or commenced, a party must take reasonable steps to preserve relevant ESI. An investigation is such an event. During this time, the ESI management policy and deletion schedule must be suspended and all relevant or potentially relevant ESI must be preserved.

As soon as a party becomes aware of an investigation, claim, lawsuit, or incident that could lead to such, it should also put in place a “litigation hold.” A litigation hold is a communication to all appropriate and entitled persons to preserve relevant ESI. This communication should be in writing.

An ounce of prevention being worth much more than a pound of cure, consult with a litigation attorney to implement an ESI management policy and to implement or respond to a litigation hold.

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