E-Discovery in Employment Litigation: Making Practical, Yet Defensible Decisions

E-Discovery in Employment Litigation: Making Practical, Yet Defensible Decisions

Introduction

Much has been said about current issues in electronic discovery, but little attention has been paid to the unique interplay between e-discovery and employment law. E-discovery can range from gigabytes (and even, on rare occasions, terabytes) of information in a nationwide class action to a thumb drive full of emails for a typical single-plaintiff case. That's why employment cases require greater attention to potential cost-saving measures, as well as a common sense look at the proportionality of the cost and benefit of electronic discovery, before diving in head-first. Recent cases provide additional direction on guiding clients through e-discovery and helping them deal with electronically stored information (ESI).

Pre-litigation: Hoping For the Best, but Preparing For the Worst

Employment counsel have an advantage over typical litigators because they often have ongoing counseling relationships with their clients. As a result, they can advise their clients to take steps to make e-discovery easier before litigation is even on the horizon. The first one of these steps is a data map, which documents all of a company's technology and where it lives including hardware, software, enterprise applications, personal computers and mobile devices. A data map helps the client to clearly outline its technology landscape, and is an invaluable tool for tracking down potentially relevant and/or responsive information once litigation arises. A data map can also be a useful business tool, as it provides the client with an opportunity to review its information technology systems and policies to ensure they still make business and legal sense. Vendors can be engaged to create a data map, or technology-savvy counsel can create a data map with the help of knowledgeable client staff. Clients should take caution, however, that a data map is an evolving document and needs to be updated regularly to account for new technology and changes to the system.

A document retention policy defines which documents to keep and why. In addition to ensuring that a company maintains necessary documents pursuant to legal and regulatory requirements, a document retention policy can ensure that only documents that are necessary to business are retained. The client's document retention policy is also a key document from a litigation standpoint because in some instances it provides protection if relevant documents have been destroyed.

Under Federal Rule of Civil Procedure 37(e) a party typically will not be sanctioned "for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system." In other words, the Rules anticipate that a party will have a justifiable basis for eliminating records. For example, in *Gippetti v. United Parcel Service, Inc.*, 2008 U.S. Dist. LEXIS 109613 (N.D. Cal. Aug. 6, 2008), the plaintiff alleged that UPS fired him because of his age, but UPS contended that the plaintiff was terminated for "stealing time" by sleeping on the job, taking excessive breaks and inaccurately recording breaks, and also for not completing required truck safety inspections. The plaintiff sought discovery of "tachograph records," which show a vehicle's speed and how long it is moving or stationary. UPS was unable to produce all the requested tachographs due to its nationwide practice of retaining tachographs for only 37 days (due to the large volume of data) after which these records were automatically purged. Plaintiff sought sanctions for

the spoliation of evidence, but the court denied the plaintiff's motion because the records had been destroyed in the normal course of business in accordance with a routine, good-faith retention policy.

Companies should ensure that their document retention policy strikes a balance between retaining electronic documents for a useful period and purging outdated, unnecessary or oversized documents from their systems in a timely manner. The document retention policy must also include provisions for litigation, and when litigation is reasonably anticipated routine document destruction pursuant to the document retention policy must cease.

Reasonable Anticipation of Litigation: Here Comes Trouble

The duty to preserve documents arises once your client has a reasonable anticipation of litigation. In employment cases, this can be a fluid concept. Of course, once a case has been filed, there is a clear duty to preserve. Courts have held that the duty to preserve also attaches once EEOC or similar agency charges have been filed – and in fact, the EEOC is now routinely including document preservation instructions on the initial charge, or when a potential plaintiff sends a demand letter. To date, there is a lack of court authority regarding whether the duty to preserve attaches for everyday employment actions such as workers' compensation or unemployment. Provided that the cost of preservation is not too onerous, it is best to err on the side of preservation for significant employment decisions such as reductions in force, strikes or contentious terminations – particularly when documented legitimate reasons can be the employer's saving defense. For actions such as workers' compensation or unemployment, documents relating to those specific actions should be preserved as long as those actions are pending and the employee, or former employee, is receiving benefits, as well as until the reasonable likelihood of litigation from those actions has passed. Counsel should also consult any specific state law requirements for preservation of documents relating to workers' compensation and unemployment. Remember, state or federal legal requirements regarding retention of certain employment records is a separate obligation from the anticipation of litigation duty to preserve!

Preservation: When In Doubt, DON'T THROW IT OUT!

Recent court decisions have highlighted that the riskiest step of e-discovery is often preservation. The result of inadequate preservation is the loss of relevant evidence, which is called "spoliation." Federal Rule of Civil Procedure 37 details the sanctions for spoliation, which range from monetary penalties all the way up to contempt of court. In one especially egregious example where documents were purposefully destroyed in violation of court order, the court sentenced the offending party to prison for a term not exceeding two years until the other side's attorney's fees were paid. *Victor Stanley, Inc. v. Creative Pipe, Inc.*, Case No. MJG-06-2662, Memorandum, Order and Recommendation (D.C. Md. September 9, 2010).

Given the danger of sanctions, it is essential that counsel gain an understanding of the basic facts of the case as soon as the duty to preserve arises. Counsel then must immediately become familiar with the client's systems for creating, using, storing, deleting and backing up its electronic information and files and the IT staff responsible for those systems. A common way of dealing with preservation is to create a "team" consisting of outside counsel, in-house counsel, human resources and IT to consult and deal with e-discovery issues, beginning with preservation and extending throughout litigation.

A more recent decision on spoliation written by one of the leading experts on the subject, Judge Shira Scheindlin, outlines the basic obligations once the duty to preserve arises. It is mandatory for a party:

- to issue a written litigation hold;
- to identify all of the key players and to ensure that their electronic and paper records are preserved;

- to cease the deletion of email or to preserve the records of former employees that are in a party's possession, custody or control; and
- to preserve backup tapes when they are the sole source of relevant information or when they relate to key players, if the relevant information maintained by those players is not obtainable from readily accessible sources.

Pension Comm. of Univ. of Montreal Pension Plan v. Bank of Am. Secs., LLC, 685 F. Supp. 2d 456 (S.D.N.Y. 2010). Failure to take these most basic steps – even in smaller employment cases – and to take them quickly once the duty to preserve arises, constitutes gross negligence. Counsel also cannot simply rely on the client's word that these steps have been taken – counsel should oversee the process and routinely follow up to ensure that documents are preserved, and continue to be preserved, as long as litigation is pending and until the threat of future litigation subsides.

The litigation hold memo is the key instrument in this process. It should not be merely a blanket statement to preserve all documents, but should instruct the client as to what specifically needs to be preserved, where and how to conduct a search, how to document the results of that search, who will be assisting the employee with the search and who to contact with questions, and the timeline for preservation. Careful thought must be given based on the particular facts and issues of the case. Clearly, preservation decisions in a one plaintiff wrongful discharge action are easier to tackle than in an employment class action involving ongoing claims – which can be a nightmare. Experienced e-discovery counsel can help sort through those issues. Litigation holds also should be resent as a reminder of the duty to preserve any time a "key player" leaves the company and whenever there is a change in the status of the litigation – for example, if the case is voluntarily dismissed, refiled, settled, or at the end of a jury trial.

Data Collection: Preservation's Tricky Cousin

Data collection goes hand-in-hand with preservation, and requires a frank discussion with the company about the costs and risks of various collection methods. Many larger companies want to do the collection themselves in order to save money. For smaller cases, this is acceptable provided someone within the client organization has the sophistication to do the collection accurately, without modifying the ESI. As with preservation, outside counsel oversight is essential to ensure that the client is conducting the collection correctly and honestly reporting its efforts.

As the pool of potential collected data becomes larger, it is often not feasible for the companies to collect the data themselves, either due to lack of expertise or interruption to their business. Many larger and/or more experienced law firms – particularly those with a dedicated e-discovery team – have the capability of conducting collections, or it might be time to engage a vendor. The considerations for hiring a vendor are too numerous to recount here, but briefly, be sure to ask around before hiring and make sure the vendor has experience with your type of systems and cases.

Regardless of who conducts the collection, it is essential that the status quo of any ESI is maintained. As most realize, the underlying data in a document (called metadata) is altered simply by opening or printing a document. An inexperienced person, even one with the best intentions, can irretrievably alter the metadata of a document if the collection process is not done correctly. The client should be reminded of this at both the preservation and collection stages.

Cooperation With Opposing Counsel (If Possible)

Federal Rule of Civil Procedure 26(f) now mandates a process where counsel for the parties must meet at the outset of a case and discuss issues such as e-discovery. While some litigation is too contentious, and some opposing counsel to obstreperous, to make the Rule 26(f) conference more than a battle of wills, it does present an opportunity to raise e-discovery issues before they become discovery disputes. More importantly, it gives you another opportunity to control costs by narrowing the scope of discovery. At the 26(f) conference, consider beginning a dialogue on the following:

- *Where is the information?* Does your opposing counsel expect you to search the hard drives of three employees, or does he expect you to search 25 servers in 10 offices around the country? Try to narrow the geographic scope of the discoverable information.
- *Custodians.* Discuss who the key players are. Limit the number of employees whose data is at issue.
- *Date range.* When did the facts at issue occur? Can you agree to cut off searching on the date the case was filed, or is there an ongoing violation at issue?
- *Key words v. concept searches v. predictive coding.* Numerous cases discuss the failures of key word searching. For example, if opposing counsel provides you with a list of 1,000 key words with search terms such as “employee” and “computer,” you will end up with a useless, and far too big, data pool. Try to limit searches to what will provide you with the smallest, most accurate results and, in appropriate cases, consider agreeing on the use of predictive coding e-discovery tools (which is a fantastic topic fit for an entire separate article).
- *Discovery in phases.* If there are multiple custodians or locations at issue, propose searching a few first and, if those do not have adequate results for opposing counsel, propose to do the rest. You may be able to cut your discovery efforts in half, or more, if you would only be collecting duplicates from other custodians and locations.
- *Form of production (native or other).* Federal Rule of Civil Procedure 34 addresses form of production. A request for production may specify the form of production, but if it does not the producing party may state what form it intends to use, as long as the form is either the form in which ESI is usually maintained or another reasonably usable form. There are positives and negatives to each form of production which should be considered before discussion with opposing counsel.
- *Metadata.* If metadata is not obviously relevant to your case, propose that metadata not be produced as a matter of course, and that you will provide metadata for specific documents if necessary later.
- *Claw-back and/or protective order.* Federal Rule of Evidence 502 provides protection against inadvertent disclosure of privileged documents if entered as a court order and should be a routine step in any case with substantial e-discovery. Also, consider adding language to the order agreeing on what constitutes inadvertent disclosure to illuminate uncertainty. A protective order may also be necessary if confidential or proprietary information may be disclosed.

This is by no means an exhaustive list of topics that can be discussed with opposing counsel. While it may be difficult to have a frank discussion without disclosing your entire litigation strategy, it will ultimately be worthwhile if you can limit the universe of ESI, and your client will appreciate the associated reduction in costs.

Review and Production

Document review is usually the most costly part of e-discovery due to vendor costs and review time. However, gone are the days where having dozens of attorneys review every page is an acceptable option. Instead, document review is another opportunity for cost-saving measures. Hopefully, you will have limited the data pool through discussions with your client and with opposing counsel. Other options are available through vendors and other review platforms to further decrease the number of documents to review, such as de-duplicating (pulling duplicate documents out of the review) and threading (linking and allowing simultaneous review of documents in an email chain). And there is the possible option of using a predictive coding tool, which in the right case can amount to a fraction of the cost of traditional human review. One size does not fit all, and choosing the proper process, applications and vendor can limit headaches.

A quick note on balancing burden and benefit

Federal Rule of Civil Procedure 26 (b)(2)(C)(iii) states that a court may limit discovery if “the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.” Recently, judges (although certainly not all) have stated that they are open to arguments about whether extensive e-discovery is reasonable given the size and potential outcome of a case. For example, a single plaintiff case where damages are potentially no more than US$100,000 does not warrant millions of dollars in e-discovery. Judge Grimm’s *Victor Stanley* decision, *infra*, contains useful citations to cases and other materials in favor of proportionality. A motion for protective order may be warranted if opposing counsel is not receptive to these arguments.

Conclusion

E-discovery in employment law cases does not need to cripple a company’s business or its bottom line. Beginning discussions before litigation strikes can prevent having to make rash, costly decisions due to the time constraints of discovery. Knowledgeable counsel familiar with rapidly developing e-discovery law can help the company defending an employment action strike the right balance between cost and production obligations in a defensible manner.

Contact

Jill S. Kirila, partner, Labor & Employment Practice Group
Co-chair, Squire Sanders E-Discovery & Data Management Team
T +1 614 365 2772
T +1 513 361 1285
jill.kirila@squiresanders.com

© Squire, Sanders (US) LLP All Rights Reserved February 2012