TECHNICAL ASSISTANCE – ELECTRONIC DISCOVERY

Prepared by the Division of Human Resources in the Department of Personnel and Administration. Effective March 1, 2007.

GENERAL

While this technical assistance is focused solely on employment-related litigation, please be advised that the federal rules also apply to non-employment litigation and the direction referenced in this technical assistance may need to be modified accordingly. Note: The term "department" has the same meaning found in rule, specifically a department or institution of higher education.

On December 1, 2006 a series of amendments to the Federal Rules of Civil Procedure relating to electronically stored information ("ESI") took effect. Many of the proposed amendments took effect in the U.S. District Court for the District of Colorado in June 2006. The amendments focus on the retention, destruction, preservation and discovery of ESI.

Parties to litigation have always had the obligation to preserve evidence when they knew or should have known that documents or information are relevant to litigation or potential litigation. The new rules merely clarify that the obligation includes electronically stored information. Courts can impose severe sanctions on parties for "the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." (spoliation).

FREQUENTLY ASKED QUESTIONS

What are some examples of ESI?

- Word Processing documents
- Spreadsheets
- PowerPoint files
- Graphic files
- Email and attachments
- Calendars and Planners
- Instant Messages
- Voicemail

…and the universe is growing.

Where is ESI located?

- Desktop and Laptop Computers
- Remote Computers and Servers
- Network Servers
- Handheld Devices
- Storage Devices, such as CDs or ZIP drives
- Offsite Storage

- Email Servers

What are the obligations?

- Identify relevant evidence
- Preserve the evidence
- Be able to retrieve the evidence so it can be reviewed and, if appropriate, produced

The obligation is to secure electronic documents and that means suspending document retention policies that automatically delete ESI, and to preserve back-up media. Parties must preserve the evidence in the form in which it exists. This includes embedded data and metadata (data about the document, such as when it was created, if and when it was revised, to whom it was sent and when they viewed it). The key is to never overwrite, modify, or manipulate evidence in litigation or potential litigation. When considering what must be preserved, computers of former employees who know or might know about litigation or potential litigation must be identified, labeled, and separated.

When does the clock start? What triggers the duty to preserve?

The legal standard for the trigger date of the preservation obligation is when a party *knows or reasonably should know* that documents or information are relevant to litigation or potential litigation. What this means in practice is:

- Any Notice of a Lawsuit
- Charge of Discrimination
- Notice of Claim
- Demand Letter from a Lawyer
- Meeting at which Someone Brings a Lawyer
- Challenge to a corrective action (if the employee alleges a violation of state/federal law such as discrimination, harassment, whistleblower, etc.)
- Any person verbally telling the department that they intend to sue

When in doubt, start the clock and start to preserve the evidence!

How do we meet the obligation?

It's important to establish a point person who will:

1. Investigate the claim to know 'what' and 'who' is relevant
2. Identify and issue the litigation hold letter to the key players
3. Collect the evidence
4. Periodically follow up with witnesses and IT

The point person will vary based on the nature of the case. In an employment case, the point person will likely be the Human Resources Director.

Who are the key players?

This will vary with the type of claim. The key players will usually be witnesses in the litigation, but could also be someone to whom the Plaintiff compares himself, or someone who keeps records. Key players can be subordinates, co-workers, or supervisors. The point person must identify the key players, and ask them to identify others who might be key players. Because the IT departments will be responsible for preserving the ESI, IT personnel will be key players.

What is the role of the IT Department?

IT personnel must play an active role in educating employees about the IT architecture and retention policy AND taking steps to secure electronic documents that are collected. That means creating secure spaces on servers/hard drives to store ESI collected, suspending document retention policies that automatically delete ESI, and preserving back up media.

How much is enough?

Everything that is potentially relevant must be preserved. What "everything" is will vary with the type of claim. The point person should have an ongoing dialogue with the key players to understand what they do and what kinds of evidence might exist.

The duty to preserve covers all kinds of evidence – electronic, paper, or physical evidence. You must preserve in the form in which it exists, including metadata.

What about the computers of former employees?

As employees leave, you must also consider whether their computers contain evidence related to pending or potential litigation. If so, you should make forensic copies of the hard drives of former employees. When key employees, such as Human Resources Directors or investigators, leave, you should save their hard drives and make forensic copies of those hard drives as well.

What should I do if I get a demand letter from an attorney?

Get in touch with your department's in-house counsel or your counsel at the Attorney General's Office as soon as possible. Do not let the letter go unaddressed.

How do I get employees to comply with the obligation to preserve evidence?

First, immediately issue a hold letter. Given the need for a specifically tailored letter that addresses the IT process and the evidence issue, it is strongly recommended that you consult with the AG's for assistance.

Second, you must establish a process to collect information covered by the hold letter. You might consider a Litigation Hold Database. In any event, you must create secure locations and clearly label documents and physical evidence. Gathering the evidence must not alter the

document's metadata. This will require the use of forensically sound search and gathering tools that do not alter the metadata.

Third, you must establish a custodian of the evidence who understands what evidence was recovered and where it is stored. This person or people must be able to describe how the search for documents was conducted including, who participated in the record gathering, what tools were used, what search terms and date ranges were used, and in whose custody the gathered documents are.

Why is a document retention policy important?

Federal Rule of Civil Procedure Rule 37 normally provides for sanctions for failure to make disclosures or failure to cooperate in discovery. The revised Rule 37(f) states that, "Absent exceptional circumstances, courts may not impose rules-based sanctions on a party for the destruction of ESI due to 'routine, good-faith operation of an electronic information system'. So if documents are destroyed before a department is aware of potential litigation, and because of the operation of a document retention policy that is consistently applied, a court will probably not impose sanctions for the destruction of the documents. Again though, once the department has notice of potential litigation, the department must suspend the retention policy as to the potentially relevant evidence.

The new Rule creates a "safe harbor" and brings some reality to the situation by recognizing that deletion or overwriting is a normal part of typical business systems. The safe harbor is not available, however, when litigation is pending or anticipated.

OVERALL RECOMMENDATIONS

- Revisit Document Retention Policies. The cornerstone of an effective discovery plan is the document retention policy that covers both electronic and paper documents. The policy will depend on the state department because statutes or regulations might bear on the retention policy or the retention of particular types of documents. A policy is important because of the safe harbor provision mentioned above with respect to the new Rule 37, keeping in mind that all relevant ESI must be taken out of the operation of any document retention policy, and must be preserved, when litigation is pending or foreseeable.

- Be consistent. The retention policy must be consistently administered. Any deviation from the retention policy might result in a court finding that sanctions are appropriate because documents were either intentionally or negligently destroyed.

- Create an ESI team. Identify who will be responsible for meeting the department's obligations. The team should include legal counsel, Human Resource and Information Technology personnel. There should be a continuing dialogue about how the team will meet its obligations.

- Determine whether each departing employee has relevant evidence related to pending or anticipated litigation and save that information. Create a mirror image ("ghost") of computers of all departing employees who are decision-makers, human resource personnel, investigators, and affirmative action and equal opportunity employees.

- Preserve back-up tapes. A common pitfall in discovery is failure to pull a back-up tape from the rotation. The tapes might not be searched and produced ultimately, but they must be preserved so they could be produced if necessary.

CONCLUSION

The consistent operation of a document retention policy is more important now than ever. Once litigation is pending or imminent, however, the retention policy must be suspended as to electronically stored information that might be relevant to the litigation. A culture of compliance can be developed by creating an ESI team to respond when the department becomes aware of potential litigation, and by having a continuing dialogue about how the obligation to preserve evidence is being met.

Every attempt is made to keep this information updated. For additional information, refer to the *State Personnel Board Rules and Director's Administrative Procedures* or contact your department human resources office. Subsequent revisions to rule or law could cause conflicts in this information. In such a situation, the law and rule are the official source upon which to base a ruling or interpretation. This document is a guide, not a contract or legal advice.

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