"Show Me the Information" or How to Meet the Challenges of E-Discovery in Wage and Hour Litigation

By Danuta Bembenista Panich

E-discovery poses challenges in all employment litigation, including deciding whether to restore data housed in legacy systems or on backup devices, and if so, how; identifying the custodians of loose files and documents, discovering where they store such "unstructured data," and finding the relevant items; wading through mountains of electronic messaging, and so forth. All these challenges exist in cases involving employees' wage and hour claims, just as they exist in cases involving claims of discrimination, retaliation, failure to accommodate special needs, denial of leave under the Family Medical Leave Act, failure to reinstate a worker pursuant to the Uniformed Services Employment and Re-employment Rights Act (USERRA), or any number of state law theories, such as breach of contract, defamation, or tortious interference with contractual relations.

However, the nature of wage and hour claims adds several more layers of complexity to an already troublesome problem and breadth to the definition of "potentially relevant" information. The broader scope of potential relevance requires expanding the search from the Human Resources Information System to uncommon sources of data—at least sources that are not common in employment litigation. Once found, data from those uncommon sources often require repurposing because the data are being used in ways they were never meant to be used. The repurposed data present unique preservation and collection challenges because of the extraordinary volume of the data and their potentially short shelf life. In combination, these factors can prove daunting to even the seasoned employment litigator.

Common Claims

The Fair Labor Standards Act (FLSA) is the primary federal law governing wage and hour issues. Among the most common wage and hour claims under the FLSA are claims alleging misclassification as an independent contractor (as opposed to an employee) or challenging exempt status—that is, whether employees are entitled to overtime compensation when they have worked more than 40 hours in a week or are "exempt" from overtime pay requirements. (Such exemptions exist for various categories of employees, including employees who are executives or professionals, work in administrative or information technology capacities but regularly exercise discretion, have outside sales as a primary duty, or work for a motor carrier in interstate commerce.) Because the FLSA does not require any records of time worked by contractors or any detailed time records with regard to exempt employees, there is ordinarily no ready source of information from which to construct the amount of time, and hence, liability, at issue if the employer fails to prevail in the case.

Off-the-clock work claims, which are frequently asserted under the FLSA and state statutory and common law, allege that employees work before or after regular hours or during break periods but are not paid for their time. As the name suggests, the employer does not typically retain formal records of the alleged additional time worked, rendering the duration of the time an open question (much like the question in exempt status or classification cases). Another frequent issue in such claims is whether the time or activities in question constitute work.

Finally, a common claim arising only under state law is alleged denial of state-mandated rest and meal periods. Many jurisdictions regulate the amount of break time that must be provided as well as the intervals at which the breaks must be provided. Often, the claims arise in circumstances in which the employer uses exception time reporting.

Exception time reporting systems assume that employees follow a set schedule that includes the mandated breaks. If an employee follows the schedule, the employer is in compliance with the law but has no actual record of the compliance. Exception time reporting requires special notation only if an exception to the schedule occurs. The reporting of exceptions ordinarily involves some level of interaction between the employee and management and is usually triggered by the employee, who has no statutory obligation to maintain time records.

The sources for exception time data may be limitless. Exceptions may be reported via e-mail or text message to specific individuals or drop boxes, through monitoring and communication systems, or by the entry of codes in another

business system. (A variant of exception time reporting is found in payroll systems that are pre-programmed to assume that certain breaks occur, even when no time clock punches or swipes are recorded. In such circumstances, a manager must manually enter changes to override the system. The author, date, and reason for changes may be captured in the final time or payroll record or may be discernible only by inspecting audit trails associated with the data.)

Information Likely to Be Requested From Employers in Discovery

The list of potentially relevant information types is lengthy and only as finite as the imagination of plaintiffs' counsel. However, the more common information types, and the e-discovery challenges they present, are cataloged below.

Time and Payroll Records: These provide payroll and time-reporting data and systems information (for example, data dictionaries and file layouts, tables for translating codes). Most employers routinely maintain detailed payroll records in a systematic way and for periods prescribed by statute or regulations. Nonetheless, employers are sometimes reluctant to produce individualized, detailed records. Uncertainty as to the relevant individuals for whom information should be produced (just plaintiffs or all potential class members or collective action participants), confidentiality concerns, format issues, and the burden of providing daily or weekly records rather than the summaries reflecting final payroll may all factor into this reluctance. Case law leaves little doubt as to whether that reluctance must be overcome. For example, in *Gilliam v. Addicts Rehabilitation Center Fund*, 2006 WL 228874 (S.D.N.Y. Jan. 26, 2006), time and payroll records for all employees were stored on compact disks. The employer argued against production in electronic form on the grounds of confidentiality, particularly since the relevant employees' data could not be extracted from the whole data set. The employer suggested that the data should be produced in redacted paper printouts. The argument was summarily rejected because of the burden of working with the data in paper form. The court brushed aside any concerns regarding confidentiality by noting the existence of a protective order.

It should be noted that, to the extent that the payroll function has been outsourced, the employer would still have prescribed regulatory preservation obligations—carried out by the vendor—as well as any obligations related to litigation that might otherwise exist, because the records are still under the employer's control. The involvement of a third party, however, requires greater coordination in order to ensure preservation and appropriate collection of the relevant data.

Time-reporting data may be more challenging regardless of outsourcing. As noted above, exception time reporting systems present their own set of issues. But even putting aside such systems, time data may reside in a number of different systems and forms. It is critical to interview technical personnel responsible for payroll and feeder systems as well as managers who are responsible for implementing and overseeing time-reporting activities in order to fully understand the relevant sources of information and any preservation challenges that may exist. Counsel should also be sensitive to the consistency of personal identifiers when information must be drawn from multiple data sources. Counsel should also inquire about the uniqueness of each identifier, because employee numbers are sometimes reused, and on other occasions, one employee has multiple identifiers even within the same system.

The same technical experts who can provide answers to such questions also may be able to provide necessary details about the organization of the information stored within the system as well as code translations, without which the data cannot be interpreted. These experts may also be instrumental in collecting relevant items of information from the databases in which they are often housed. In this regard, even though the payroll and time data will have to be produced in an electronic form (assuming the data are maintained in such form) that allows plaintiffs' counsel to readily analyze and manipulate the data, the precise format as well as the desired fields of information may be disputed. The production of online data may entail only specified fields (a targeted extraction) or the entire database (a data dump). Disputes can arise no matter which method is unilaterally selected. *See,* for example, *Jackson v. City of San Antonio*, 2006 WL 487862 (W.D. Tex. Jan. 31, 2006), in which the employer produced the entire database over the complaint of the plaintiff, who did not want to sift through all the data for relevant bits and pieces. Because the employer provided all necessary codes and translations along with the data, and the amount of effort to extract specific items was equal for both parties, the plaintiff's complaints were rejected.

Determination of the form and scope of the production will depend, in part, on the system's architecture, the quantity of data, and reporting options. The best approach is often the negotiated solution, taking into account these factors.

Time-Keeping and Payment Rules: These include policies and procedures, handbooks and online resources, collective bargaining agreements and other contracts, and technical and user guides reflecting systems information. Preservation and production challenges here usually relate to online resources. Many employers do not maintain records of changes in content, nor do they keep snapshots of the online content or off-line versions of all content. In addition, personnel who manage or administer the online resource (a web master, for example) often do not control or "own" the content. Taking steps to preserve on a going-forward basis, as well as identifying sources of historical information, are key early activities.

Evidence of Willfulness and Good Faith: This may consist of internal complaints and grievances; employee surveys and studies; internal and external audits; administrative and judicial claims; management communications, including directives to perform "extra" work; research; and training. Under the FLSA, the applicable limitations period (two years or three years from the date a consent to participate in litigation was filed) depends on a showing of willfulness. Conversely, the employer may have at least a partial defense to otherwise mandatory liquidated (double) damages if the employer establishes that the actions were taken in good faith and with reasonable grounds to believe the FLSA was not violated. 29 U.S.C. § 260. Therefore, plaintiffs' counsel frequently searches for anything that may indicate that the employer knew, or should have known, that the FLSA was being violated, while the employer has an incentive to produce evidence of good faith and reasonable efforts to comply. Evidence of willfulness and good faith may also have an impact on the extent of

recovery under some state law theories.

When a class or collective claim is at issue, particularly in a decentralized organization, the biggest challenge to finding relevant evidence relating to willfulness or good faith is often finding all sources of the requested information. Human resources, legal department, regulatory compliance, training, and labor relations files, databases, and shared work spaces are all potential targets. Employees' complaint vehicles, such as "hot lines," may also provide relevant data. Since the operation of such complaint vehicles may be outsourced, preservation and collection efforts may need to include third parties.

Management communications—which may contain the proverbial smoking guns, if they exist—present an additional "volume" problem that can escalate review costs dramatically. Courts are not generally sympathetic to this problem. In the absence of particularized evidence of burden, courts are entirely unswayed. For example, in *Helmert v. Butterball LLC,* 2010 U.S. Dist. LEXIS 60777 (E.D. Ark. May 27, 2010), the plaintiffs requested "communications … that concern payment of wages for … donning, doffing, walking, sanitizing … studies," electronically stored information (ESI) (including communications) containing names of individuals mentioned in another wage and hour case or in "relevant documents" and names of leading Supreme Court decisions. The employer objected to the relevance of these requests and the burden providing them imposed. During the meet-and-confer process, the plaintiffs proposed that a reasonable solution would be an "ESI search of 43 custodians for 70 separate terms dating back to 2000." Plaintiffs defined the pool of ESI to be searched as "email accounts … computer hard drives, databases, backup tapes, and non-Butterball email accounts to which Butterball had access." When the employer rejected the proposed compromise, the plaintiffs moved to compel the employer to comply. Butterball's primary argument in opposition focused on the burden of conducting the requested search and production, but the court largely brushed aside Butterball's argument. The court ignored review costs and was not convinced that electronic searches were at all burdensome.[1] (The only exception was with regard to backup tapes, which the court found were "inaccessible.") The court focused, instead, on the likelihood that relevant information would be found in the identified sources by using the means suggested. The court limited the search to items dating back to 2005, excluded "names found in relevant documents" from the search criteria, and excluded the owner and nondecision-making custodians from the custodian pool. The court approved the remainder of the plaintiffs' sampling plan.

It should be noted that volume is a problem not only for the employer but also for the plaintiff. Search terms are rarely precise, and a smoking gun is rarely found. Thus, e-mail or other management communications that are produced are most likely to reveal very little while requiring substantial review time—even for the plaintiff. The likelihood of meager returns on investment may serve as an incentive to both parties to develop and apply a very targeted search protocol.

Incentives for Off-the-Clock Work: These may be found in work rules, performance expectations, disciplinary actions and threats of such actions, promotional opportunities, contests, bonuses, commissions, and management goals. In off-the-clock claims, plaintiffs try to demonstrate that management has incentives to get "extra" work out of employees. Plaintiffs claim management turns a blind eye toward what management knows is happening even if management does not openly require it.[2] At the same time, the plaintiffs attempt to prove that the employees have no real choice regarding whether to perform such "extra" work: Either the carrots are too big to expect anyone to forgo them (bonuses and commissions, for example), or the stick is wielded with such regularity and frequency that employees live in terror of losing their jobs (such as disciplinary action and threats thereof for failing to meet performance expectations).

Much of the information relevant to the issue of incentives is ordinarily available from the Human Resources Department or from Payroll staff. However, management communications may also be implicated, again raising the volume problem. As previously noted, the most effective solution to that issue is often a compromise that provides for sampling of such communications based on limited lists of custodians and specified search terms.

Preservation and Collection Strategies: These include document retention policies and procedures and steps taken to preserve, locate, and collect ESI. Although irrelevant to the substance of the claims, most cases of any magnitude will result in some exploration of retention practices and a hunt for spoliation. Document retention policies are generally held to be fair game and should not be difficult to produce. *Jones v. Bremen High School Dist. 228*, 2010 WL 2106640, *9 (N.D. Ill. May 25, 2010) (spoliation stemming from failure to produce document retention policy: "It is inexplicable that defendant could not produce the DRP.") In contrast, litigation holds are generally considered to be privileged and not subject to production. *In re eBay Seller Antitrust Litigation*, 2007 WL 2852364 (N.D. Cal. Oct. 2, 2007). Nonetheless, the opposing party may be entitled to know what kinds and categories of ESI employees were instructed to collect and what specific actions they were instructed to undertake. *Gibson v. Ford Motor Co.*, 2007 WL 41954 (N.D. Ga. Jan. 4, 2007).

Plaintiffs' Preservation and E-Discovery Obligations

The bulk of ESI in any employment case is in the hands of the employer. Nonetheless, plaintiff employees are not entirely off the hook in wage and hour cases. Because time worked and whether an individual was performing work are often questions, employees have an obligation to preserve and produce information that is in their possession or control and reflects their activities or records their work time. Calendars, diaries, and other such personal records may provide valuable insight into the latter. Phone and text logs, personal e-mail account activity, and social media activity all may shed light on the former. *Mancuso v. Florida Metropolitan University Inc.*, 2011 WL 310726 (S.D. Fla. Jan. 28, 2011) (ordering the production of logs reflecting personal activities during periods for which compensation was claimed).

The Complicating Effect of Limited Record Keeping

The FLSA does not require time records for exempt employees and independent contractors and permits exception time reporting. The FLSA requires retention of detailed time records only for two years, although the statute of limitations may be three years. The result is inadequate or nonexistent formal records of time worked. As already noted, by definition, no formal record of the time at issue in claims of off-the-clock work will exist. In order to fill this gap in records, the parties to FLSA cases must often look for data in uncommon places.

Where to Look for More Data

Business systems that retain date and time-stamp data reflecting business transactions (such as cash register or point of sale receipts) or interactions with customers (such as order entries) are the most likely candidates as data sources capable of providing valuable insight into employees' activities. In order to be useful, however, date and time stamp data must be tied to specific employees. In addition, the entries must be *searchable* by employee identifier. In other words, if the only way to retrieve data is by customer identifier, attempting to find information on particular employees is impracticable.

Similarly, date and time stamps in manufacturing or equipment monitoring systems may provide clues as to employees' activity so long as the systems tie back to individual employees.

Business records—particularly records of customer transactions—are ordinarily retained for extended periods of time; however, at some point, their volume may mandate archiving older data off the online system in order to avoid affecting the functionality of the system. Archiving should not give rise to spoliation, because all relevant information is preserved (although it is noteworthy that some contrary authority exists). However, any argument that focuses on the burden of producing the archived data is likely waived. *Orbit One Communications Inc. v. Numerex Corp.*, 271 F.R.D. 429, 437 (S.D.N.Y. 2010) ("If a party creates its own burden or expense by converting into an inaccessible format data that it should have reasonably foreseen would be discover able material … then it should not be entitled to shift the costs of restoring and searching the data.").

Network and computer logs such as Windows event logs, server sign-on or user authentication logs, and audit trails within applications may all provide some relevant information. However, such logs are primarily used for troubleshooting, not for tracking historical activities. As a result, preservation of such data may often be an insurmountable challenge, particularly at server or network levels. The business need for the information is generally of very short duration. The volume of the information is often huge. To preserve space while still meeting business needs, information may be quickly overwritten.

Logs associated with individual computers (such as Windows event logs) may retain data for a longer period, which can be measured in months rather than days. However, because much of the data these logs retain is irrelevant, differentiating the relevant from the irrelevant and harvesting only the former for case purposes frequently requires reliance on experts, and collection of individual machine data is time-consuming and may be quite costly. Early discussion of the benefits and costs of preserving and producing such data is therefore imperative.

Date and time stamps associated with individual employees' activities may also be found in or associated with communications; these include Microsoft exchange log files, computer-based learning modules, instant messages, and text messages. Of these, computer-based learning modules may be easiest to harvest, but their utility is limited because of sporadic use. The problem with other, more regular and frequent communications is, again, volume and the resulting difficulty of separating the wheat from the chaff in terms of relevance and reliability of the data.

Finally, some information may be gleaned from building security or badge swipe data, although such information is more valuable for exclusionary purposes than for proving time worked. Entering a building is generally not indicative of any specific work activity. Extrapolating work time from building entry time is unreliable, because lag times are not standardized. On the other hand, if the nature of the work requires physical presence, security data may limit the amount of time worked that can be claimed.

When attempting to use time stamps from alternative systems to demonstrate time worked, how the time is established and recorded and how it is to be interpreted should be carefully explored. Time stamps may reflect the location of a server, rather than the location of the employee. Time may not be synchronized from one system to another, turning what appears to be off-the-clock work into innocent and meaningless discrepancies. Understanding the systems from which data are obtained is critical to assessing the value of the information and determining whether it is worthwhile to preserve and produce. **TFL**

Danuta Bembenista Panich is a shareholder in the firm of Ogletree, Deakins, Nash, Smoak & Stewart, PC, resident in its Indianapolis office. She has practiced in the field of labor and employment law and litigation since 1978. Much of her practice focuses on representing employers in class and collective actions involving wage and hour claims or discrimination claims and advising employers on electronic discovery and records retention. She heads Ogletree's Records Retention and E-Discovery Practice Group.

Endnotes

[1]*Mancia v. Mayflower Textile Services Company*, 253 F.R.D. 354 (D. Md. 2008), is another case that emphasizes the need to "provide a particularized factual basis to support any claims of excessive burden or expense."

[2]In this regard, the FLSA imposes liability so long as management "suffers or permits" work to be done, even if the work was not ordered, and even if it was prohibited—for example, by general work rules stating that overtime work is prohibited unless approved in advance.