E-Discovery in Employment Cases: Practical Considerations for Employers

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This Practice Note addresses e-discovery issues in employment cases from the employer's perspective, including proportionality, document preservation, spoliation, electronically stored information (ESI), bring your own device (BYOD) practices, attorney-client privilege, and strategies for obtaining e-discovery from plaintiffs. This Note applies to private employers and addresses federal law.

Contents

E-discovery is an essential component of most employment-related lawsuits. Modern technology and communication tools have substantially increased the volume of **electronically stored information** (ESI) in the workplace. As Judge Shira Scheindlin of the U.S. District Court for the Southern District of New York presciently recognized more than a decade ago in *Zubulake v. UBS Warburg LLC* (*Zubulake I*), as "individuals and corporations increasingly do business electronically … the universe of discoverable material has expanded exponentially" (217 F.R.D. 309, 311 (S.D.N.Y. 2003)). Most employment disputes, including claims involving discrimination, harassment, retaliation, and breaches of **restrictive covenants**, are fact-intensive, further increasing the relevance of email and other electronic communications.

The high volume of ESI in the workplace has drastically increased the costs and burden for employers litigating employment disputes. However, the effective use of ESI can sometimes strengthen an employer's case or defenses. For example, emails, text messages, or other ESI can be used as evidence to demonstrate, among other things, that an employee had notice of a certain policy or procedure or engaged in wrongdoing.

This Practice Note discusses e-discovery issues in employment litigation from an employer's perspective, including:

- Proportionality and cost-shifting in employment litigation under the Federal Rules of Civil Procedure (FRCP).
- Employers' document preservation obligations, including:
  - identifying when the preservation obligation arises;
  - issuing and updating litigation hold notices; and
  - evaluating potential custodians.
- Early assessment of ESI, including initial **meet and confer** obligations.
- Defining the scope of an employer's document production.
- Sanctions for **spoliation** of evidence.
- Bring your own device (BYOD) workplaces.
- Potentially privileged communications on an employer's system.
- Strategies for obtaining discovery from employees.

For more information about procedural considerations in e-discovery, see E-Discovery Toolkit.

Proportionality in Employment Litigation

When litigating employment disputes, employers typically control most of the discoverable evidence, including ESI. For instance, employees often seek discovery of email and many other types of ESI from employers, including:

- Emails received by or sent from the employee and the employee's co-workers, supervisors, or other witnesses.
- Electronic calendars and meeting notices.
- Documents or information stored on an employee or witnesses' company-issued or personal hard drives, iPads, and other devices.
- Flash drives, thumb drives, and CDs.
- Documents stored on corporate shared drives or joint work spaces.
- Mobile communications between witnesses or employees, including:
  - text messages; or
  - instant messages (IMs).

- Recordings of voicemail or telephone calls.
- Internet traffic history.
- Company intranet posts.
- Current and historic copies of employee handbooks and other policies.
- Personnel databases (for example, databases of employees' races, ethnicities, gender, or other **protected classes**).
- Payroll records and time sheets.
- Other forms of attendance records, including building access history.
- Applicable reports or other information relevant to an employee's specific duties or job performance.
- Information about other similarly situated employees.
- Information about the employer's past employment discrimination claims, charges, or settlements with other employees.

In contrast, employees who are parties to employment disputes typically have limited discoverable ESI because most of their relevant email and electronic files reside on the employer's servers.

Because of this data imbalance, employers often expend substantially more time and resources responding to **requests for production of documents** (RFPs) than their adversaries. The costs of collecting and producing ESI can be high compared to the potential damages at issue, especially in a single plaintiff discrimination case, even if the scope of discovery is relatively narrow.

Although proportionality is not a new concept to discovery or the federal rules, disproportionality can change the litigation dynamic in employment litigation cases by:

- Reducing incentives for plaintiffs to cooperate in discovery by, for example, limiting the scope of production.
- Creating the potential for more discovery disputes and, therefore, additional costs.
- Incentivizing early settlement for the employer, even in cases that lack merit.

For more information on litigating employment cases generally, see Practice Note, Employment Litigation: Single Plaintiff Employment Discrimination Cases and Employment Litigation: Single Plaintiff Employment Discrimination Toolkit.

For more on considerations about settling employment claims, see Settling Employment Disputes Toolkits.

Proportionality Under the FRCP

FRCP 26 defines the scope and limits of discovery in federal civil litigation, including employment litigation. As amended in December 2015, Rule 26(b)(1) generally permits parties to obtain discovery of non-privileged information that is both:

- Relevant to any party's claim or defense (no longer including information that is "relevant to the subject matter" of the action).
- Proportional to the needs of the case, considering:
    - the importance of the issues at stake in the action;

- the amount in controversy;
- the parties' relative access to relevant information;
- the parties' resources;
- the importance of the discovery in resolving the issues; and
- whether the burden or expense of the proposed discovery outweighs its likely benefit.

(FRCP 26(b)(1).)

FRCP 26 also addresses e-discovery. Under FRCP 26, a party is not required to provide ESI if the information is not reasonably accessible because of either undue burden or cost. The employer must provide admissible evidence about the nature and quantity of the undue burden (see, for example, *Zoobuh, Inc. v. Better Broadcasting, LLC*, 2017 WL 1476135, at *4-5 (D. Utah Apr. 24, 2017) (defendant failed to quantify how much responsive material was in its possession and therefore did not establish undue burden); *Fish v. Kobach*, 2016 WL 893787, at *1 (D. Kan. Mar. 8, 2016) (employers must support undue burden objections with evidentiary proof)).

Even if the party from which discovery is being sought makes a showing of inaccessibility, the court may still:

- Order discovery of the requested ESI if the requesting party shows good cause, considering the limits of FRCP 26(b)(2)(C).
- Specify conditions for the discovery.

(FRCP 26(b)(2)(B).)

The 2015 amendments created a two-part test for assessing the propriety of a discovery request. To be discoverable, information must be both relevant and proportional (*Gramercy Grp., Inc. v. D.A. Builders, LLC*, 2017 WL 5230925, at *1 (D. Haw. Nov. 9, 2017)). The proportionality requirement gives employers another avenue for challenging overly broad or burdensome discovery requests (*Vaigasi v. Solow Mgmt. Corp.*, 2016 WL 616386, at *13 (S.D.N.Y. Feb. 16, 2016) (proportionality "has become 'the new black'"); *Albritton v. CVS Caremark Corp.*, 2016 WL 3580790, at *4 (W.D. Ky. June 28, 2016) ("Proportionality is the touchstone of the revised Rule 26(b)(1)'s scope of discovery provisions."); but see *McKey v. U.S. Bank Nat'l Ass'n*, 2018 WL 3344239, at *2 (D. Minn. July 9, 2018) (the concept of proportionality has been "enshrined within 26(b)" since the 1983 amendments)).

Courts may balance the need for discovery against whether discovery production has reached a point of diminishing returns or only has only marginal utility (see, for example, *Abbott v. Wyoming Cty. Sheriff's Office*, 2017 WL 2115381, at *2 (W.D.N.Y. May 16, 2017)). Employers have had some success in arguing that document requests are disproportional to the needs of the case. For example, courts have:

- Denied a plaintiff's motion to compel 1,027 requests in a second request for production, after the defendant produced approximately 1,000 pages in response to plaintiff's first document request because it was, among other things, disproportional to the needs of the case (*Vaigasi*, 2016 WL 616386, at *15).
- Denied as overbroad and disproportional a plaintiff's request for company-wide information regarding matters irrelevant to the plaintiff's claims of gender and disability discrimination, including:
  - the defendant's employees' race, age, and coverage under pension plans or 401(k) plans;

- a complete list of all of the defendant's employees for the past three years, including their names, salary, job title and description, performance evaluations, and education level;
- the same information regarding all employees discharged by the defendant during the past three years; and
- all company-wide job openings after the plaintiff's departure.

(*Jackson v. Catholic Charities of the Archdiocese of Omaha, Inc.*, 2016 WL 4074143, at *2 (D. Ne. July 29, 2016).)

- Denied a plaintiff's request for information seeking "every type of document involved in the employment relationship" from an employer that produced more than 500 pages of documents, relying on proportionality considerations under the FRCP amendments (*Black v. Buffalo Meat Serv., Inc.*, 2016 WL 4363506, at *6 (W.D.N.Y. Aug 16, 2016); but see *Kennicott v. Sandia Corp.*, 2018 WL 4148423, at *16-19 (D.N.M. Aug. 30, 2018) (allowing plaintiffs' discovery of complaints filed by defendant's female employees asserting pregnancy discrimination, sexual harassment, gender-based hostile work environment, and retaliation in pay discrimination class action)).
- Limited a discovery request to a particular region or worksite (see, for example, *Razo v. Timec Co., Inc.*, 2016 WL 1598601, at *3 (N.D. Cal. Apr. 21, 2016)).
- Limited discovery to the defendant employer only, not its parent company or other affiliated entities (*Frieri v. Sysco Corp.*, 2017 WL 2908777, at *3 (S.D. Cal. July 7, 2017)).
- Denied as disproportional to the needs of the case a defendant's request for a third party review of the plaintiff's Facebook account following review and production of documents by plaintiff and her counsel (*Westmoreland v. Wells Fargo Bank Nw., N.A.*, 2016 WL 6471433, at *4 (D. Idaho Oct. 31, 2016)).

However, where the employer is the only source of information (which is common in employment cases), the plaintiff has a stronger argument that the discovery request is not disproportionate or that there is good cause for compelling production (see, for example, *Albritton*, 2016 WL 3580790, at *4).

In some cases, proportionality considerations may limit an employer's ability to obtain discovery from a plaintiff. For example, in *Williams v. U.S. Environmental Services, LLC*, the court found that the employer's request for information regarding the plaintiff's past employers, positions, salaries, and reasons for leaving were:

- Not relevant to the parties' claims or defenses in a discrimination, harassment, and retaliation case under **Title VII of the Civil Rights Act of 1964** (Title VII).
- Not proportional to the needs of a fairly routine single plaintiff employment discrimination case.

(2016 WL 684607, at *3 (M.D. La. Feb. 18, 2016); see also *Henry v. Morgan's Hotel Grp., Inc.*, 2016 WL 303114, at *3 (Jan. 25, 2016) (denying an employer's request for information from the plaintiff's three prior employers in discrimination case).)

On the other hand, a court may compel an employee to comply with an employer's broad discovery requests if the employer can demonstrate that its requests are proportional to the needs of the case. For example, in *First Niagara Risk Management, Inc. v. Folino*, the court granted the employer's request for a former executive to search his personal electronic devices and email accounts using approximately 25 search terms because:

- The ESI requested by the employer was relevant to the employer's claim that the employee breached his restrictive covenant agreement and other claims.
- The issues were of "grave" importance to the employer and the importance of the discovery in resolving the issues at dispute in the case weighed in favor of the employer.

- The substantial burden and expense of discovery for the employee did not outweigh the benefit of the discovery for the employer.

(317 F.R.D. 23, 28-9 (E.D. Pa. 2016).)

State laws and procedural rules in some states, including Utah, Minnesota, and Illinois, have taken steps to emphasize proportionality in discovery and ease the production burden on employers (see, for example, URCP Rules 26(b)(1) and 26(b)(2); MRCP Rule 1; IL R. S. Ct. Rules 201(a) and 201(c)(3)). Counsel should check local rules to determine whether proportionality principles can help defend against overly burdensome discovery production requests.

For a summary of the FRCP amendments, see Legal Update, Overview of December 2015 Amendments to the Federal Rules of Civil Procedure.

Potential for Cost-Shifting

The general rule is that the party producing evidence, including ESI, bears the cost of production. In certain circumstances, however, a party may seek a cost-shifting order from the court to protect the responding party from undue burden or expense (FRCP 26(c)).

As interpreted by the courts, cost-shifting is only potentially available when a party seeks electronic discovery of relatively inaccessible data (*Zubulake I*, 217 F.R.D. at 323). In *Zubulake I*, the court enumerated a seven-factor test for evaluating the propriety of cost-shifting, to be weighted in the order listed:

- The extent to which the request is specifically tailored to discovery relevant information.
- The availability of the information from other sources.
- The total cost of production compared to the amount in controversy.
- The total cost of production compared to the resources available to each party.
- The relative ability of each party to control costs and its incentive to do so.
- The importance of the issues at stake in the litigation.
- The relative benefits to the parties of getting the information.

(17 F.R.D. at 323; see also *Williams v. Angie's List, Inc.*, 2017 WL 1318419, at *5 (S.D. Ind. Apr. 10, 2017) (analyzing similar factors in declining to impose cost-shifting)).

Employers rarely can pass this hurdle to recover all their costs, although sometimes they can recover a portion of the costs. The other way employers may potentially recover costs, if the plaintiff is solvent, is by making an offer of judgment under FRCP 68 (see Practice Notes, FRCP 68 Offers of Judgment and Rule 68 Offers of Judgment in Fair Labor Standards Act Collective Actions).

Rule 26(c)(1)(B) provides that a court may specify terms "including time and place or the allocation of expenses, for the disclosure or discovery" when entering a **protective order**. This provision, added as part of the 2015 amendments, recognizes the court's authority to order cost-shifting, and does not "imply that cost-shifting should become a common practice" (2015 Advisory Committee Notes to FRCP 26(c)(1)(B)). Cost-shifting remains the exception, not the rule (*Gaudet v. GE Indus. Servs.*, 2016 WL 2594812, at *4-5 (E.D. La. May 5, 2016)).

Many post-amendment cases have continued to apply the *Zubulake* factors and analysis, without any discussion about whether the amendments affect their applicability (see, for example, *Bailey v. Brookdale Univ. Med. Ctr.*, 2017 WL 2616957, at *4 (E.D.N.Y. June 16, 2017); *Nehad v. Browder*, 2016 WL 3769807, at *3-4 (S.D. Cal. July 15, 2016); *Wagoner v. Lewis Gale Med. Ctr., LLC*, 2016 WL 3893135, at *4 (W.D. Va. July 14, 2016); *Hallmark v. Cohen & Slamowitz, LLP*, 2016 WL 1128494, at *4 (W.D.N.Y. Mar. 23, 2016)).

Employer's Document Preservation Considerations

Once an employer reasonably anticipates litigation, it must implement a **litigation hold** to preserve potentially relevant documents and ESI (see Practice Note, Implementing a Litigation Hold: Purpose of a Litigation Hold and When to Implement a Litigation Hold; FRCP 37(e), 2015 Advisory Committee Notes).

In employment litigation, the employer's preservation duties are often more complicated than the plaintiff's because:

- The employer may have difficulties identifying exactly when the duty to preserve evidence arises.
- There are many possible custodians who must be notified of a litigation hold.
- There is an ongoing duty to enforce and update the litigation hold.
- There is often a significant volume of potentially relevant data to preserve, especially in a **class action** alleging violations of employment discrimination statutes, such as Title VII, or a collective action under the **Fair Labor Standards Act** (FLSA).

Employers must carefully consider the scope of the litigation hold and comply with their legal obligations to avoid potentially harsh sanctions and penalties should discoverable data be deleted or destroyed. For more information about litigation holds generally, see Practice Note, Practical Tips for Preserving ESI and Litigation Hold Toolkit.

Identifying When the Duty to Preserve Arises

The duty to preserve documents arises once a party reasonably anticipates litigation (see Practice Note, Implementing a Litigation Hold: When to Implement a Litigation Hold; FRCP 37(e), 2015 Advisory Committee Notes). In employment disputes, this duty may attach much earlier than in other commercial litigation contexts. Employers are often on notice of the potential for litigation well before an employee files a lawsuit in court. For example:

- The duty to preserve arises when the employer receives:
  - a demand letter from the employee or the employee's attorney threatening litigation; or
  - a letter from a federal agency that its investigation of an employee complaint may result in litigation in federal court.

  (*Perez v. US Postal Serv.*, 2014 WL 10726125, at *3 (W.D. Wa. July 30, 2014).)
- In federal employment discrimination cases, the duty to preserve arises (at the latest) when the employer receives notice of an employee's charge filed with **Equal Employment Opportunity Commission** (EEOC) or similar administrative agency (29 C.F.R. § 1602.14; *Marshall v. Dentfirst, P.C.*, 313 F.R.D. 691, 695-97 (N.D. Ga. 2016); *Martin v. Stoops Buick, Inc.*, 2016 WL 1623301, at *5 (S.D. Ind. Apr. 26, 2016); *Tabon v. Univ. of Pa. Health Sys*, 2012 WL 2953216, at *2 (E.D. Pa. July 20, 2012)).

- If an employment termination is contentious, employers may be on notice of the need to preserve information related to the termination as early as the termination date (see, for example, *Viramontes v. U.S. Bancorp*, 2011 WL 291077, at *4 (N.D. Ill. Jan. 27, 2011)).
- If a **reduction in force** (RIF) occurs, employers generally should preserve documents, including ESI and metadata, associated with the decision-making process underlying the RIF (see *Williams v. Sprint/United Mgmt. Co.*, 230 F.R.D. 640 (D. Kan. 2005)).
- An employee's internal complaint about violations of law or employment policies may trigger the obligation to preserve documents. However, there is generally no affirmative duty to preserve documents or ESI if an employee's internal grievance does not alert the employer:
  - to suspected violations of law; or
  - that litigation is imminent or reasonably foreseeable.

  (See, for example, *Hixson v. City of Las Vegas*, 2013 WL 3677203, at *5 (D. Nev. July 11, 2013); *Viramontes*, 2011 WL 291077, at *4.)

Evaluating Possible Custodians and Litigation Hold Recipients

There are many possible custodians who should receive a written litigation hold notice when an employment dispute arises, including:

- A plaintiff employee's direct and indirect managers or supervisors and their respective assistants.
- A plaintiff employee's co-workers who may be witnesses or possess relevant information.
- The human resources (HR) department, to ensure that the employer preserves any applicable personnel files and other relevant documentation.
- The payroll department, to ensure that the employer retains any applicable payroll and compensation records.
- The office manager, particularly in small companies where the office manager often performs both HR and payroll functions.
- The records management department, to ensure that normal course record retention policies are suspended.
- The information technology (IT) department, to ensure that the employer suspends all automatic deletion protocols or other processes that may result in deletion or loss of relevant data.
- Third-party service providers where the employer exercises or can exercise control over their documents or information, such as:
  - staffing agencies;
  - professional employer organizations (PEOs); or
  - cloud storage providers.

  For more on third-party custodians, see Joint Employers and Professional Employer Organizations (PEOs) as Potential Custodians.

It is usually advisable to be over-inclusive when determining the recipients of litigation hold notices, even if furnishing that notice may create personnel issues. For example, employers are sometimes reluctant to provide a litigation hold notice to an employee's

co-worker because of the employer's desire to keep the existence of the dispute confidential. While an employer's hesitation to publicize a workplace dispute and desire for confidentiality is understandable, given the severe sanctions for spoliation, employers should consult with counsel regarding the appropriate scope of a litigation hold before deciding to narrow it.

In some cases, the employer also may have an obligation to notify a parent, subsidiary, or affiliate entity of the litigation hold, especially if the related entity is believed to possess or control documents or information relevant to the plaintiff's claims.

For sample litigation hold notices, see Standard Documents, Litigation Hold Notice and Litigation Hold Letter (To Client).

Joint Employers and Professional Employer Organizations (PEOs) as Potential Custodians

Employers engaged in co-employment or joint employer relationships with professional employer organizations (PEOs), payroll companies, or staffing companies may be required to notify the service provider of a litigation hold. As employers of record, PEOs and staffing companies likely possess relevant ESI that must be preserved and, therefore, should be included in the litigation hold notice. Payroll companies that obtain and process company data should also be included. If the employer has control over third-party documents based on its contractual or business relationship with the service provider, it may be required to request the documents or electronic files from the third-party service provider and produce the information directly (see, for example, *Landry v. Swire Oilfield Servs., L.L.C.*, 323 F.R.D. 360 (D.N.M. 2018)).

Some PEO contracts expressly require the primary worksite employer to inform the PEO of any claims, charges, or incidents at the workplace. For a sample PEO contract, see Standard Document, PEO Client Service Agreement.

Ongoing Duty to Enforce and Update a Litigation Hold

Employers must issue periodic reminders about a litigation hold to ensure compliance (see, for example, *Pension Comm. of the Univ. of Montreal Pension Bank v. Banc of Am. Sec., LLC*, 685 F. Supp. 2d 456, 471 (S.D.N.Y. 2010)). Updating a pending litigation hold is particularly important when:

- The dispute is a long-running litigation.
- The lawsuit is brought as a putative collective or class action.
- The claims or defenses change over time and the employer needs to expand the litigation hold.
- Employees continue to generate discoverable ESI after the employer issued the initial litigation hold.
- New employees hired after the initial litigation hold have access to or generate information subject to a litigation hold.

Early Assessment of Potentially Relevant ESI

In many organizations, employees typically send and receive hundreds of emails (or more) each week, maintain electronic calendars, and store numerous electronic files on their hard drives, company shared drives, and in cloud-based storage. Given the volume of data to preserve, employers should conduct a preliminary assessment and review of ESI to identify relevant data and possible parameters regarding the scope of discovery. Specific criteria employers may consider in identifying and sorting ESI include:

- Key players.
- Applicable date ranges.
- Available file types.
- Potential search terms.

For tips on preserving and sorting electronically stored information, see Practice Note, Reducing E-Discovery Costs: Applying an Analytical Approach.

Employers and their counsel should complete the process of assessing ESI early in the case, often before receiving any formal discovery demands from the plaintiff. This helps counsel to evaluate:

- The costs of discovery relative to the value of the claims in the case.
- Whether the employer must take any further steps to implement a litigation hold.
- The volume of potentially responsive data.
- The need for and selection of possible search terms or keywords.
- Whether there are potentially privileged documents or confidential information that warrant a protective order.
- Whether there are any special issues to raise at early discovery conferences.
- Which e-discovery platform or platforms are likely to best serve the needs of the case.
- Whether there is a preferable production format, such as:
    - a native-format production in original file format, for example, .docx for Microsoft Word files (see Practice Note, The Case for Native Production); or
    - an image production format, for example **TIFF** or **PDF**.

    For more on e-discovery production formats, see E-Discovery: Common ESI Production Formats Chart and Practice Note, Document Production Protocols in Federal Civil Litigation: Production Format.
- How much time the employer needs to complete a comprehensive collection and review of ESI.

While it is typically not necessary or feasible to collect and review a substantial number of documents at the beginning of a lawsuit, it may be prudent for counsel to collect and review the data sources that are likely to be the most relevant to determine whether there are any helpful or problematic documents or records that strengthen or weaken the merits of a case.

For more information on preparing for and managing e-discovery, see:

- Practice Note, Practical Tips for Preserving ESI.
- E-Discovery Project Management Checklist.
- Article, E-Discovery Glossary.

An early assessment also helps the employer prepare for the FRCP Rule 26(f) initial conference, when the parties must be prepared to discuss a plan for, among other things:

- Preserving discoverable information, including ESI.
- Conducting proposed discovery.

For more information, see Initial Meet and Confer and:

- Practice Note, Collecting Documents and Electronically Stored Information in Federal Civil Litigation.
- Standard Document, Rule 26(f) Report and Discovery Plan.
- Rule 26(f) Conference Checklist.

Initial Meet and Confer

FRCP 26(f) requires counsel to meet at the outset of the litigation to discuss the proposed discovery plan, including e-discovery, before the Rule 16 scheduling conference. The parties must confer as soon as practicable, but generally (unless the case is on an expedited schedule) at least 21 days before either:

- The day of the scheduling conference.
- The due date for the scheduling order under FRCP 16(b).

(FRCP 26(1)(f).)

At the Rule 26(f) conference, attorneys of record are jointly responsible for attempting in good faith to agree to the proposed discovery plan. The discovery plan must address the parties' views and proposals on any issues about disclosure or discovery of ESI, including the form in which it should be produced.

A court's FRCP 16(b) scheduling order may also require disclosure or discovery of ESI and to include agreements reached by the parties for asserting privilege claims after they produce information.

To maximize the productivity of the Rule 26(f) initial conference, counsel should be well prepared and should assess in advance the employer's technology and potential discovery burdens. While employers sometimes hesitate to disclose detailed information about their ESI, it is often useful to exchange information with an employee's counsel about the existence and accessibility of ESI during the meet and confer process, including:

- Potential custodians.
- Relevant date ranges.
- Search terms and methodology, including a party's desire to use **predictive coding** to conduct searches (see Practice Note, Long Live Predictive Coding).
- Production format (see E-Discovery Management Checklist: Production Formats).
- Timing of production and whether it should be on a rolling basis, all at once, or in phases.
- The need for a protective order.

- Any issues related to the burdensome production of ESI, including the potential for cost-shifting (see Potential for Cost-Shifting).

Coordinating with the Employee's Counsel to Determine Scope and Production Format of ESI

The preservation duty may not apply to all aspects of a company's business. Employers often can reasonably limit the scope of the litigation hold and further search for responsive ESI to custodians within the employee's:

- Reporting line.
- Business unit.
- Division or department.
- Physical workplace.

If an employer wants to limit the scope of a litigation hold or searches for relevant documents, it should strongly consider conferring with the plaintiff's counsel to reach an agreement that the limitations are reasonable given the known facts. Counsel routinely discuss these issues as part of the FRCP 26(f) initial conference (see Initial Meet and Confer). The parties can always agree to modify the scope of the litigation hold or search for additional documents if they discover facts warranting expansion.

Employers should also confer with plaintiff's counsel about the preferred forms of production. E-discovery-savvy plaintiff's counsel likely have a preference, which may or may not be consistent with how the employer plans to produce. Whether or not plaintiff's counsel is experienced with the nuances of e-discovery, raising the issue early with them may prevent later complaints that they received e-discovery in an unacceptable format.

For more information, see Practice Note, Collecting Documents and Electronically Stored Information in Federal Civil Litigation: Collection Negotiations.

Spoliation Sanctions

Sanctions in employment cases for failure to preserve relevant evidence, including ESI, can result in serious penalties. FRCP 37(e), as amended in December 2015, permits sanctions against a party for the failure to preserve ESI if:

- The party does not take reasonable steps to preserve ESI that it should have preserved in anticipation or because of litigation.
- The information is lost.
- The information cannot be restored or replaced by additional discovery.
- Either:
  - the loss of information prejudices another party (FRCP 37(e)(1)); or
  - the spoliating party intentionally deprived another party from using the information in the litigation (FRCP 37(e)(2)).

(FRCP 37(e).)

FRCP 37(e) requires a two-step analysis of:

- Whether spoliation occurred.
- What, if any, sanction is appropriate, depending on whether the spoliation:
  - is prejudicial; or
  - was intentional.

(*Goldrich v. City of Jersey City*, 2018 WL 4492931, at *7, 11 (D.N.J. July 25, 2018).)

The amended rule provides for different levels of sanctions depending on the spoliator's intent. If a court finds that the loss of ESI prejudices another party, it may order sanctions "no greater than necessary to cure the prejudice" (FRCP 37(e)(1)). If, however, the party responsible for losing or destroying ESI acted with the intent of preventing another party from using the ESI in litigation, a court may impose more severe sanctions under FRCP 37(e)(2) and may:

- Presume that the lost information was unfavorable to the party.
- Instruct the jury that it may or must presume the information was unfavorable.
- Dismiss the action or enter a default judgment (FRCP 37(e)(2)).

(FRCP 37(e) and 2015 Advisory Committee Notes to FRCP 37(e)(1) and (2); see Practice Note, Sanctions for Spoliation Under FRCP 37(e): Overview.)

A court may not impose sanctions if the employer has taken reasonable steps to preserve ESI. The routine, good faith operation of an electronic information system is a relevant factor to evaluating whether an employer took reasonable steps. Courts also consider proportionality when determining whether an employer's efforts were reasonable. (2015 Advisory Committee Notes to FRCP 37(e); see also Proportionality in Employment Litigation.)

Post-amendment decisions recognize the higher bar on imposing the more severe sanctions under FRCP 37(e)(2) and require a showing of intentional spoliation (see, for example, *OrchestrateHR, Inc. v. Trombetta*, 178 F. Supp. 3d 476, 489-90, 493 (N.D. Tex. 2016); *Accurso v. Infra-Red Servs., Inc.*, 169 F. Supp. 3d 612, 618 (E.D. Pa. 2016); *Nuvasive, Inc. v. Madsen Med., Inc.*, 2016 WL 305096, at *2-3 (S.D. Cal. Jan. 26, 2016)). One court, for example, refused to impose the sanction of dismissal because under the amended rules, it may impose sanctions "no greater than necessary" under FRCP 37(e)(1) to cure any prejudice resulting from the destruction of evidence (*Ericksen v. Kaplan Higher Educ., LLC*, 2016 WL 695789, at *1 (D. Md. Feb. 22, 2016)). Another court refused to impose spoliation sanctions under FRCP 37(e) because the destruction of ESI did not prejudice the plaintiff (*Snider v. Danfoss, LLC*, 2017 WL 2973464, at *1 (N.D. Ill. July 12, 2017) ("No harm; no foul.")).

However, if a party engages in intentional spoliation of ESI, a court does not need to find prejudice to issue terminating sanctions (*OmniGen Research v. Wang*, 321 F.R.D. 367, 371-72 (D. Ore. 2017)).

Counsel should understand that FRCP 37(e) only governs sanctions for the spoliation of ESI. Courts may order appropriate sanctions for the loss or destruction of physical evidence under their inherent authority to sanction parties for bad faith, vexatious, wanton, or oppressive conduct (see Practice Note, Sanctions in Federal Court: Sanctions Under a Court's Inherent Authority).

Some jurisdictions also recognize stand-alone tort claims for negligent or intentional spoliation of evidence (see, for example, *Hazen v. Municipality of Anchorage*, 718 P.2d 456, 463 (Alaska 1986) (intentional); *Mace v. Ford Motor Co.*, 653 S.E.2d 660, 664 (W. Va. 2007) (negligent); *Velasco v. Commercial Bldg. Maint. Co.*, 169 Cal. App. 3d 874 (1985) (negligent); *Callahan v. Stanley Works*, 306 N.J. Super. 488, 497-98 (1997) (negligent)). FRCP 37 does not preempt or otherwise affect the validity of these state law claims.

For more on spoliation sanctions, see:

- Practice Note, Sanctions for Spoliation Under FRCP 37(e): Overview.
- Practice Note, Document Discovery Case Tracker: Sanctions and Cost Recovery.
- Practice Note, Sanctions in Federal Court.
- Spoliation Sanctions by US Circuit Court Chart.
- Sanctions Toolkit.

BYOD Workplaces and E-Discovery

Workplace bring your own device (BYOD) programs complicate an employer's e-discovery process. In a BYOD workplace, employees are permitted to use their own laptops or mobile devices for both work and personal use. Employers must remember to include all relevant custodians and their BYOD devices when implementing a litigation hold and collect relevant documents from them or else risk potential sanctions.

For example, in *Small v. University Medical Center of South Nevada*, the court imposed sanctions on the defendant for numerous e-discovery violations, including the failure to issue any litigation hold addressing BYOD devices despite the fact that several key employees confirmed that they used their personal mobile devices for work-related purposes (2018 WL 3795238, at *63 (D. Nev. Aug. 9, 2018)). In another case, the corporate defendants were required to preserve text messages on employees' personal cell phones that were used for business purposes (*In re Pradaxa Prods. Liab. Litig.*, 2013 WL 6486921 (S.D. Ill Dec. 9, 2013)).

An employer's obligations are more limited when employees do not use their personal devices for work-related purposes. Some courts have held, for example, that the text messages on the plaintiff's co-employees' personal cell phones were not within the employer's possession, custody, or control because the plaintiff did not contend that:

- The employer issued the cell phones to the employees.
- The employees used the cell phones for any work-related purpose.
- The employer otherwise had a right to obtain the employees' text messages on demand.

(*Cotton v. Costco Wholesale Corp.*, 2013 WL 3819974, at *6 (D. Kan. July 24, 2013).)

Courts have required some evidence that the devices contain relevant information, especially before ordering production of a plaintiff's personal cell phone or other mobile device (*Ewald v. Royal Norwegian Embassy*, 2013 WL 6094600, at *10 (D. Minn. Nov. 20, 2013)).

Employers that require, request, or are aware that their employees use their personal mobile devices for work-related purposes likely have an obligation to preserve relevant evidence on those devices. A comprehensive written BYOD policy setting forth the

requirements and obligations for BYOD programs can assist employers in implementing a litigation hold and collecting documents from mixed-use devices. For more information about drafting a BYOD policy, see Standard Document, Bring Your Own Device to Work (BYOD) Policy.

Communications Between an Employee and Counsel on an Employer's System

When collecting and reviewing employee emails, an employer may discover communications between an employee and the employee's attorney seeking legal advice in connection with the employee's possible claims against the employer. While employees should use personal email accounts and personal devices for these communications, in reality employees sometimes communicate with their lawyers using company devices and company email until they are advised otherwise by their counsel. The discovery of potentially privileged communications gives rise to tricky ethical and legal questions, such as when an employee waives the attorney-client privilege.

Courts are split on whether an employee waives the attorney-client privilege by communicating with the employee's attorney using the employer's email. The resolution of these issues typically turns on whether the employee's expectation that the communication with the employee's counsel was private and confidential. Factors that a court may consider include whether:

- The employer had a policy that prohibited personal use.
- The company regularly monitored the use of computers and email.
- Third parties had a right to access computers and emails.
- The company notified the employee that monitoring was taking place or the employee was otherwise aware of the use and monitoring policies.

(See *In re Asia Global Crossing Ltd.*, 322 B.R. 247, 257-58 (S.D.N.Y. 2005) (identifying factors); see also *Kreuze v. VCA Animal Hosps., Inc.*, 2018 WL 1898248, at *2-3 (D. Md. Apr. 20, 2018) (analyzing *Asia Global* factors, finding plaintiff's use of employer's email did not waive the attorney-client privilege); *Holmes v. Petrovich Dev. Co., LLC*, 191 Cal. App. 4th 1047 (Cal. Ct. App. 2011) (finding no privilege in email communications); *Stengart v. Loving Care Agency*, 990 A.2d 650 (N.J. 2010) (holding that privilege was not waived).)

A plaintiff's subjective belief that an employer rarely monitored its employee's emails, without more, may be insufficient to show that an attorney-client communication on the employer's email system was privileged (*Bingham v. Baycare Health Sys.*, 2016 WL 3917513, at *5-6 (M.D. Fla. July 20, 2016)).

Counsel should also check applicable rules of professional conduct and ethical rules when faced with this issue. Even when employers are confident that the employee has waived the privilege, given ethical duties, employers may wish to notify the employee's attorney of the discovery of the communications and the employer's position regarding privilege waiver (see ABA Formal Opinion 11-460, "Duty When Lawyer Receives Copies of a Third Party's Email Communications with Counsel" (2011)). This approach may also help prevent a later discovery dispute in court.

Thinking Offensively: Requesting ESI from Employees

Employers can potentially obtain valuable information from employees by thinking offensively. Employees now routinely electronically communicate personal information in email, social media, and text messages, sometimes seemingly with little or no discretion. Employers should consider serving employees with a preservation notice once they are on notice that litigation has begun or is reasonably anticipated. Because individual employees are less likely to be familiar with their discovery obligations in litigation, employers should specifically inform them to preserve all relevant evidence, including ESI, on all devices and accounts that may contain ESI, such as the employee's:

- Personal email account.
- Cellular phone.
- Blackberry.
- Personal computer.
- Flash drives, storage discs, or CDs.
- iPads and other electronic devices.

During discovery, the employer should send thorough document requests to obtain all relevant preserved information from all these sources that may include the following types of ESI:

- Communications relating to the dispute, including any of the allegations in the complaint.
- Emails, text messages, or other communications concerning an employee's damages and efforts to mitigate damages, such as:
    - resumes, cover letters, or records of job searches;
    - information showing the employee has not been diligent about searching for work, such as photos of extended travel; or
    - information showing the employee cannot work.
- Electronic calendar entries, potentially relevant to prove or disprove an employee's job search and other mitigation efforts.
- Electronic journals that may evidence the diligence (or lack of diligence) of an employee's mitigation efforts.
- Photographs or videos that may, for example, undermine an employee's claim of emotional distress.
- Instant messages to and from witnesses or the employee.
- Text messages to and from witnesses or the employee.
- Recordings of voicemail or telephone calls.
- Electronic copies of documents produced in paper format.
- Records from social media accounts, such as Facebook, Twitter, Instagram, LinkedIn, and YouTube, including:
    - profile information;

- photographs;
- postings;
- comments;
- messages and other communications;
- status updates;
- wall comments;
- tweets or retweets;
- causes or groups joined;
- activity streams;
- videos; and
- blog entries.

For example, in employment disputes involving emotional distress claims, the plaintiff employee's social media profiles, postings, and communications can be discoverable when they "reveal, refer, or relate to events that could reasonably be expected to produce a significant emotion, feeling, or mental state" (*EEOC v. Simply Storage Mgmt.*, 270 F.R.D. 430, 436 (S.D. Ind. 2010); see also *Holter v. Wells Fargo & Co.*, 281 F.R.D. 340, 344 (D. Minn. 2011); *Robinson v. Jones Lang LaSalle Ams., Inc.*, 2012 WL 3763545, at *2 (D. Or. Aug. 29, 2012)). For more on emotional distress claims, see Practice Note, Remedies: Compensatory Damages in Employment Discrimination Cases.

For more information on obtaining social media discovery from plaintiffs, see Practice Notes, Scope of Discovery from Plaintiffs in Employment Discrimination Cases: Social Media Accounts and Social Media Practice Guide. For sample document requests to plaintiffs in a variety of employment cases, see Standard Documents:

- Document Requests: To Plaintiff in a Single Plaintiff Discrimination Case.
- Document Requests: to Plaintiff in an FLSA Administrative Exemption Misclassification Case.
- Document Requests: to Plaintiff in an FLSA Executive Exemption Misclassification Case.
- Document Requests: To Plaintiff in an FLSA Independent Contractor Misclassification Case.
- Document Requests: To Plaintiff in an FLSA Tip Pooling or Tip Credit Case.

Courts ultimately determine whether an employer's discovery requests to an employee are permissible and within the scope of the FRCP based on the:

- Relevance of the information sought.
- Proportionality of the information sought to the amount at stake in the litigation.
- Existence of an undue burden, cost, or other consideration that should limit discovery.

(FRCP 25(b)(1).)

Some courts have considered the degree to which discovery invades an employee's privacy. For example, in *Crabtree v. Angie's List, Inc.*, the US District Court for the Southern District of Indiana denied the defendant employer's request for GPS and location services data from the FLSA plaintiffs' personal electronic devices used during work time. The court found that the forensic examination of plaintiffs' devices was not proportional to the needs of the case because the plaintiffs' privacy and confidentiality interests outweighed any benefit the data could provide. (2017 WL 413242, at *3 (S.D. Ind. Jan. 31, 2017).)

For more information about litigating employment discrimination lawsuits, including the discovery phase and beyond, see:

- Practice Note, Employment Litigation: Single Plaintiff Employment Discrimination Cases.
- Single Plaintiff Employment Discrimination Toolkit.
- Employment Litigation Discovery Toolkit.
- Employment Litigation Remedies Toolkit.

