

LITIGATION REQUIRES PRODUCTION OF ELECTRONIC DOCUMENTS

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Many companies are not aware that they must disclose electronic documents, as well as paper ones, during litigation. This obligation may not be met by simply printing out a few emails. In some cases, thousands or even millions of documents stored on computer hard drives, back-up servers and hand-held devices may need to be reviewed and disclosed.

The *Rules of Civil Procedure* define “document” to include information in electronic form. Therefore, there is no doubt that the requirement to disclose and produce all relevant documents applies to electronic documents and records, which may include e-mail, Web sites, browser history, voicemail, cell phone logs, databases, spreadsheets and drafts of Word documents.

With so many employees using email, computers and hand-held devices, many wrongful dismissal lawsuits will require disclosure of at least some electronic documents. In some cases, it may be enough to find and print a few relevant emails. In other cases, such as when misuse of company computers is alleged, technical assistance may be required to preserve, search, compile, disclose and produce the relevant data.

Relevance is the first and primary consideration in deciding what, if any, electronic documents need to be disclosed. All documents, whether electronic or not, with a semblance of relevance to the issues in the litigation should be disclosed.

Beyond the relevance test, the *Rules of Civil Procedure* and the decided cases don't provide much guidance on the extent of electronic document disclosure. Due to computer storage capacity and the widespread use of computers and e-mail, the obligation to disclose electronic documents could potentially be much more onerous than the disclosure of paper documents. Guidelines have been developed to place some limits on electronic disclosure.

The guidelines are based on the principle of proportionality. In other words, the extent of electronic disclosure obligations should be proportionate to the value of the action, the issues at stake and the relevance of the documents sought.

The guidelines suggest that the parties to litigation agree on an electronic discovery plan, including what kinds of documents are likely to be relevant and where they might be found.

Parties are advised to start by searching the most readily accessible information, called “active data”. Active data is data that is currently used and accessible, such as information stored on a computer's hard drive. In most cases, the parties will only need to search the active data for relevant documents.

While active data is relatively easy to retrieve, it can be hard to preserve because its accessibility means that it can be changed or deleted. Even printing a copy of a file for litigation can change

electronic information associated with that file, called “meta data”. Meta data includes when and by whom a document was created, saved or modified. In some cases, meta data may be relevant to a dispute. In those cases, steps should be taken to preserve the meta data before the production of documents.

In some cases, parties may be required to search through archived data or data saved as an emergency back-up. This is likely to be very time consuming and expensive. In most cases, it will not be necessary, but parties should consider whether it may be necessary in a particular case.

Employers must be aware of their obligations because failure to disclose relevant electronic documents may result in a court finding against the employer because of a lack of evidence, or may even result in the inference that the employer destroyed or withheld evidence that would have damaged its case.

The best time to consider these issues is **before** receiving a statement of claim. Many employers have developed policies on retention of documents, which include rules for the retention and the destruction of electronic records.

At the very least, employers should consider where relevant electronic records may be found when they receive a statement of claim. The employer should then take steps to preserve all relevant electronic documents, which may include preserving meta data, as discussed above. An electronic discovery plan will likely involve legal counsel, as well as information technology specialists.

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