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News For School and Municipal Clients

Preserving and Producing Electronic Evidence in Legal Disputes

Across the country, employers increasingly are storing employment and other information electronically. Communications take place via electronic mail (i.e., e-mail) and employment records are frequently maintained on a computer instead of on paper. If, for example, a school district finds itself suddenly involved in a legal dispute or employment investigation, or if there is a threat of an impending dispute or investigation, then the school district has a duty to preserve all evidence that may be relevant to the dispute or investigation, which often includes e-mails and other electronic data. Not only is such data preservation required, but it also may be beneficial to the employer in many circumstances. Therefore, it is crucial for the employer to understand what information needs to and should be preserved, and to take reasonable steps to safeguard that information from destruction.

In a 2004 decision, Chief Justice Abrahamson of the Wisconsin Supreme Court recognized that the storage and retrieval of electronic information possesses unique characteristics and, therefore, poses unique problems when a legal dispute arises. Due to the complexities of electronic data, courts around the country have been discussing at length special considerations unique to electronic data in legal disputes and the requirements for producing such data when requested.

A series of federal New York cases has provided particularly good guidance on the precautions that must be taken when the preservation and disclosure of electronic data is

at issue, as well as the repercussions for destroying relevant electronic information. Although the opinions of that court are not controlling in Wisconsin, numerous courts across the country have cited the findings from the New York cases with approval.

In *Zubulake v. UBS Warburg*, an employee sued her employer for gender discrimination. During the discovery phase of the litigation (when parties have the opportunity to request documents from each other that they think may be relevant to the dispute), the employee requested copies of numerous e-mail messages from her employer. Most of the requested e-mails had been deleted and were only contained on back-up tapes or other formats that were extremely costly to retrieve and restore.

Typically, the expense of producing documents requested during the discovery process is borne by the party producing the requested documents. If, however, it becomes necessary to create replicas of computer hard drives or restore deleted files, the cost may be several thousand dollars, and a judge may order that the cost be split between the parties. The judge in the *Zubulake* case ordered that the expenses be shared by the employer and employee. The employer, however, was required to bear the entire cost of recovering e-mails that it had inappropriately deleted.

The *Zubulake* decisions also emphasized that an employer's duty to preserve evidence, including all potentially relevant e-mails, arises when the employer first has notice that the evidence may

be relevant to a present or impending claim. In *Zubulake*, the employer indisputably had notice and, therefore, a duty to preserve electronic evidence, when the employee first filed her claim with the Equal Employment Opportunity Commission. In fact, the employer may have had notice even before a formal claim was filed.

The proper preservation of electronic information is equally important in the context of an employment investigation. Employers, including school districts, increasingly rely on e-mails and other electronic information when investigating and proving misconduct. By carefully preserving information that may be relevant to an investigation or an adverse employment action, the employer ensures not only that it has preserved information that may be requested by the employee, but also that the employer has the information it needs to support and defend its disciplinary decisions.

The employer need not preserve every document in its possession, but it must take reasonable steps to preserve information that it knows or should know is relevant to the dispute or investigation, or is likely to be requested by the opposing party. The employer must suspend any routine document destruction policies that it has in place and, instead, preserve all relevant documents and e-mails.

One important step for employers to take when faced with the duty of preserving electronic information is to immediately inform all employees who may have information related to the dispute to refrain from deleting e-mails or other electronic files relating to the topic at issue. Frequently, administrative and other

employees who are not directly involved in the dispute possess relevant information and e-mails which need to be preserved as well.

Ultimately, it was determined in *Zubulake* that several back-up tapes of e-mails that the company created as a matter of practice were inexplicably unable to be located, including e-mails that were deleted after the employer had explicitly been ordered to stop deleting e-mails. The judge, therefore, determined an appropriate penalty for the employer's inability to produce the requested tapes.

When the gender discrimination case finally made its way to the jury, the judge instructed the jury to assume that any e-mails on the back-up tapes that the employer wrongly destroyed would have been damaging to the employer. This is a severe sanction, and makes it difficult for the offending party to prevail. In fact, the employee in *Zubulake* won a \$29 million verdict against the employer who had destroyed back-up tapes containing relevant e-mails.

Because of the harsh legal consequences that employers may face if they fail to preserve necessary electronic documents, in addition to the difficulty of proving employee misconduct, it is important for employers to understand what documents must be kept and when. Moreover, an employer's duty to preserve documents for purposes of legal disputes is in addition to the employer's record retention obligations under numerous state and federal employment laws. If an employer knows of an existing or impending legal dispute, it should immediately cease destruction of any data that may be related to the claim.

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