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# E-Discovery and Litigation Holds: The Ever Increasing Duties Imposed on Litigants

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Advances in technology over the last decade have changed the way that companies communicate with customers, with clients and with each other. Rather than making phone calls or sending letters, employees today, armed with lap tops and the latest hand held devices, zip off unprecedented numbers of emails and text messages all vying to provide the most current information possible. Clients now expect to be updated in "real time" and upper management demands that they be given the information necessary to make that happen.

While no one would argue that these advances have opened the door to allow companies to reach unparalleled levels of efficiency and service, the requirement to preserve this massive amount of electronic data when a company is deemed to have "reasonably anticipated litigation" has also become more important. Whether your company is planning to file suit or has been threatened with suit, failure to take steps to preserve electronic data can result in enormous fines and sanctions, as well as instructions to a jury that they are to presume that the destroyed documents would have harmed your case, if they were available.

While, at first glance, one may think that these types of severe sanctions are reserved solely for parties that have intentionally deleted emails or other electronic data. They are not. A fact that was made abundantly clear in January of this year when the New York Federal Court, in the case of *Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, LLC*, sanctioned six plaintiffs with adverse jury instructions and monetary fines for what the Court determined was "gross negligence" as it relates to failing to understand electronic discovery guidelines.

What did the Court determine was gross negligence? First, it determined that litigation became "reasonably clear" ten months before suit was filed. Then, the Court ruled that, at the time that litigation became reasonably clear, these plaintiffs failed to: issue a written litigation hold; preserve the electronic and paper records of "key players"; immediately cease the deletion of email; and preserve electronic backup tapes when they are the sole source of relevant information or when they relate to key players, if the relevant information maintained by those players is not obtainable from readily accessible sources. As a result, these plaintiffs were subjected to adverse jury instructions and monetary fines. It is important to note that there were no allegations that any of these plaintiffs had acted in bad faith with regard to their duties, but rather, that the above practices should be so common place that their failure to immediately implement them, subjected them to sanctions.

In addition to the issues noted above, seven plaintiffs in the same case were subjected to lesser monetary fines for "ordinary negligence" because their searches for relevant electronic documents were deemed deficient because not all relevant files and emails were included in the searches. The Court saw this as a lack of adequate supervision and held that monetary sanctions alone were appropriate.

The ruling in *Pension Committee* was handed down by Judge Shira A. Scheindlin, one of the leading jurists in the area of e-discovery obligations. She issued what many consider the most influential opinions on e-discovery obligations in a long running litigation known simply as *Zubulake*. She titled her opinion in *Pension Committee* as "*Zublulake* Revisited: Six Years Later" and has clearly upped the ante while expressing her frustration at parties' continued failure to adhere to the original requirements set out in *Zubulake*.

**What Companies Can Do to Protect Themselves**

What does *Pension Committee* mean for you? Given the likelihood that Judge Scheindlin's ruling will be cited and discussed vigorously by Courts all across the country, once litigation becomes reasonably clear, you must take steps to preserve and collect all electronically stored information, which ranges from e-mail messages to web browser history files to drafts of word documents.

General instructions to employees not to destroy documents that you or they believe might simply relate to a particular party or dispute are clearly insufficient. Among other things, active and specific participation by upper management, inside counsel, IT departments and outside counsel are mandatory. Counsel should help identify when litigation is reasonably clear and then detailed litigation hold letters should be distributed to everyone to ensure that relevant data and information is being preserved. Upper management, along with counsel, must make sure that recipients of litigation hold letters understand their requirements and secure their cooperation. Former employee files and records must also be preserved and, if possible, these former employees should be contacted to make sure that they understand the need to preserve potentially relevant information. As an additional safety measure, outside counsel's IT department should work hand in hand with your IT department to make sure that data is being stored properly.

Working together with your attorney to ensure compliance with e-discovery obligations will help avoid possible sanctions that could be imposed during litigation. It will also help ensure that your business can go on as usual while navigating the potential pit falls that are associated with any litigation.