RECORD RETENTION ISSUES FOR HUMAN RESOURCES

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INTRODUCTION

Human resources records are changing. Less than five years ago, the most common type of HR record was a paper personnel file, usually containing standard categories of paper documents, such as application materials, benefit elections, performance evaluations, commendations and disciplinary memos. Now the nature of those records is quite different. Companies employ online recruiting and application processes and enterprise-wide personnel databases. The most dramatic shift, however, has come in the day-to-day management of employee communications. Employee complaints, supervisor evaluations and even disciplinary actions often take place via some electronic communication method, usually email or instant messaging. Given estimates that more than ninety percent of all corporate records are now created electronically, and seventy percent of those are never reduced to paper form, HR records are not likely to be exempt.

As these records become more prevalent in the daily functions performed by a human resources department, they also become more important in employment-related litigation. The changes to the Federal Rules of Civil Procedure that took effect in December 2006 have received much press but little praise. Interestingly, many of the key decisions relating to electronic records, both before and after the rule changes, were in the area of employment disputes.

This article will outline some of the specific aspects of records retention of Human Resources related materials, and will discuss some of the employment-related court decisions that bear on this topic. Finally, it will make recommendations regarding the implementation of a retention procedure for Human Resource departments.

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NEW RULES

Much has already been written about the changes to the Federal Rules of Civil Procedure, and such is not the focus of these materials. Nevertheless, a basic understanding of the new landscape for employers in litigation is key to crafting an appropriate retention policy.

The Federal Rules of Civil Procedure govern, not surprisingly, the way civil litigation is handled in federal courts. This is particularly important to employers, because many of the claims brought by employers reside in federal courts. Title VII of the Civil Rights Act of 1964, the Fair Labor Standards Act, the Family and Medical Leave Act, the Americans with Disabilities Act, and the Employee Retirement Income Security Act, are all federal statutes, and claims under these statutes almost always end up in federal courts.

The Federal Rules of Civil Procedure, in turn, govern how these cases proceed. Of particular interest are the rules relating to the exchange of information between the parties during the litigation, or discovery. Rules require the parties to meet and confer on certain ground rules (Rule 16), to disclose certain information to each other at the beginning of a case (Rule 26), to answer written questions (Rule 33), and to produce relevant "documents" to each other upon request (Rule 34).

The fundamental changes adopted in 2006 revolved around an acknowledgement that "documents" and "information" now include material stored electronically, referred to as Electronically Stored Information ("ESI"). Under the new rules, parties must meet and confer about how their electronic records are stored, must disclose information about how their data is structured, and must produce electronic documents as readily as paper ones. Thus, in an ESI-intensive area such as Human Resources, these rule changes can have a profound effect.

THE HR-ESI UNIVERSE

Perhaps the most difficult task regarding employee-related ESI is understanding the universe of available information. Some sources are obvious. Others, not so much.

E-mail

Electronic mail may be relevant in employment litigation in a host of ways. Messages from employee to supervisor may be used to lodge complaints about working conditions. Supervisors may comment on employees' performance in email messages, or may even engage in coaching and counseling employees electronically. An email itself may be the evidence of bad behavior by either employee or manager. For example, an employee may send an inappropriate message to a co-employee, potentially creating a hostile environment. Or a supervisor may use inappropriate language or epithets in an email, thus creating potential evidence of a discriminatory mindset. In some cases, the employer will want to retain and organize the messages because they can be useful in defending against employment claims. In other cases, the employer will wish the email had never been written in the first place. Herein lies the value of a well thought-out and consistently followed record retention policy.

Calendars

The chronology of events can be critical in employment litigation. In workplace harassment claims, for example, the date of a complaint to Human Resources, the swiftness of the employer's response, and the thoroughness of an investigation can have a substantial impact on employer liability. Many employees now use electronic calendaring systems, such as Microsoft Outlook, to keep track of appointments and events. The contents of these systems, therefore, can be important in pursuing or defending a claim.

Databases

Human Resources departments use databases extensively in their daily operations. Individual HR professionals may create simple systems to track basic information, like who has attended mandatory training on a certain topic. Companies may create more sophisticated repositories, in database or spreadsheet format, to facilitate large initiatives like reorganizations or reductions in force. Finally, enterprise-wide systems can track huge amounts of data, such as payroll information, about the company's entire workforce. Each of these databases may be stored differently, accessed differently, and subject to varying levels of security. Nevertheless, because they can all be important in litigation and compliance, they all must be addressed by a record retention program.

Instant Messages

Instant Messaging is gaining presence as an acceptable method of corporate communication, and is in fact the norm in some industries like financial services. Even more fleeting than email was perceived to be in its infancy, IM conversations are just that: conversations that users often think of as existing only for the duration of the session. Not so, however. Depending on individual or enterprise-wide settings, IM conversations can be stored in log files indefinitely, and can thus be a ripe source of discovery in employment cases, along the same subject matter areas as emails.

Other Sources

Every employer will have its own unique combination of sources of ESI. Digitized voice mail, portable hardware such as PDA's, backup tapes, document management systems, and local storage media such as CD's, DVD's, and thumb drives are all potential sources of documentation that is either generated by HR, or relevant to an employment claim. As such, companies must consider integrating all these kinds of po-

tential categories of ESI into a records retention program.

RISK MANAGEMENT

While the changes to the Federal Rules arguably only formalized a pre-existing obligation to treat ESI as discoverable material, the dramatic increase in attention given to this topic will have a substantial affect on the risks of non-compliance. First, the plaintiff's employment bar will be far more cognizant of ESI as a potential source of helpful information in litigation. This is especially true because, in the average employment suit, the employer is likely to be the only party with a substantial volume of ESI to search, review and produce. Thus, in many cases, the potential cost of complying with e-discovery obligations will outweigh the potential value of a single-plaintiff employment matter, and will change the settlement dynamic dramatically.

Likewise, judges are becoming less tolerant of companies who fail to manage electronic records properly. The result: sanctions. One company was ordered to pay $25 million for failing to produce certain documents to the Securities and Exchange Commission. Another was charged $2.75 million for failing to follow a court's production orders. Other sanctions can include instructions to the jury which would allow them to draw adverse inferences from the employer's failure to properly retain relevant documents—which can sometimes have a critical impact on the outcome of a case.

EMPLOYMENT CASES

Many of the seminal cases regarding electronic records retention have arisen from employment disputes.

Zubulake

Long before the Federal Rule changes, the majority of courts evaluating electronic discovery obligations began to apply the cost-shifting analysis established in *Zubulake v. UBS Warburg LLC*, ("*Zubulake I*").[1] Zubulake was a gender discrimination case in which the parties had a substantial discovery dispute over the employer's obligation to produce archived email records about the employee's tenure at the company. In *Zubulake I*, the court held that "cost-shifting should be considered *only* when electronic discovery imposes an 'undue burden or expense' on the responding party." The court established a seven-factor test, which courts consistently have applied in determining whether to shift the costs of electronic discovery from the responding party to the requesting party. The relevant factors, set forth in order of importance, include:

1. The extent to which the request is specifically tailored to discover relevant information;
2. The availability of such information from other sources;
3. The total cost of production, compared to the amount in controversy;
4. The total cost of production, compared to the resources available to each party;
5. The relative ability of each party to control costs and its incentive to do so;
6. The importance of the issues at stake in the litigation; and
7. The relative benefits to the parties of obtaining the information.

The court also stated that "whether production of documents is unduly burdensome or expensive turns on whether it is kept in an *accessible or inaccessible* format."[2] The court described five types of electronically stored information: (1) active, online data; (2) near-line data; (3) offline storage/archives; (4) backup tapes; and (5) erased, fragmented or damaged data.[3] The first three types are considered accessible while the last two types are inaccessible.[4] Thus, if the requested information is stored on backup tapes or consists of erased, fragmented or damaged data, the court properly may engage in the seven-factor cost-shifting analysis.

Williams v. Sprint/United Mgmt. Co.

In this age discrimination action,[5] the defendant inadvertently disclosed documents (mathematical spreadsheets regarding an adverse impact analysis) that defendant claims were protected by the attorney-client privilege. Plaintiffs argued that defendant waived the privilege by producing the documents, by referring to them in deposition testimony, and by asserting the "good faith" affirmative defense. The court found that the documents were privileged and that defendant did not waive the privilege. In so finding, the court addressed the large volume of documents in hard copy and electronic format and the precautions taken to label the documents "privileged" and to earmark the documents in a privilege log. The court noted the proposed amendments to Rule 26(f), which acknowledges that privilege waiver issues "'often become more acute when electronically stored in-

formation is sought.'" The court found that the precautions defendant took to prevent inadvertent disclosure were adequate.

A subsequent decision from this case also addressed the issue of whether certain spreadsheets had to be produced in their native format, or whether the production of hard copies was sufficient. In an important ruling on the issue of "metadata," the court found that the native spreadsheet files were required because they contained unique data, including formulas and calculations, which bore on the method of selecting employees for layoff.

Turner v. Resort Condominiums Int'l

In this case,[6] plaintiff sued defendant for pregnancy and sex discrimination after plaintiff's employment was terminated. The parties engaged in lengthy discovery disputes involving plaintiff's demand for a litigation hold on defendant's electronic data and for inspection of defendant's computer systems. Plaintiff sent defendant a pre-suit letter demanding that defendant "for an indefinite time not modify or delete any electronic data in any mainframe, desktop, or laptop computers, or other storage media devices, and not upgrade or replace any equipment or software." The court stated that this pre-suit letter "did not accommodate the routine day-to-day needs of a business with a complex computer network and demanded actions by RCI that went well beyond its legal obligations…and its more general duty to avoid deliberate destruction of evidence." While a motion for summary judgment was pending, plaintiff brought a motion to compel production, claiming that defendant "failed to produce important metadata" that would support plaintiff's claim. Defendant subsequently produced all relevant information to plaintiff; despite the produced information, the court granted defendant's motion for summary judgment. Plaintiff also filed a motion for sanctions for defendant's failure to produce the required discovery. The court denied plaintiff's motion but held that, because defendant produced documents only after plaintiff brought the motion to compel, defendant was not entitled to an award of attorney's fees and costs as the prevailing party and pursuant to Rule 54(d).

Semsroth et al. v. City of Wichita

In this case,[7] plaintiffs brought a sexual harassment and gender discrimination suit against the defendant City of Wichita. The City moved for plaintiffs to pay all or part of the costs relating to the discovery of the City's email on the grounds that the costs associated with performing word searches of its back-up tapes was unduly burdensome. The court discussed the amendments to the Federal Rules of Civil Procedure, focusing particularly on Rule 26(b)(2)(B), and applied the *Zubulake* factors in determining whether cost-shifting was warranted. The court rejected the plaintiffs' argument that the City should be held at fault because it chose its own back-up system and stated that the back-up tapes used were "a reasonable storage method." The court ultimately concluded that the factors weighed against cost-shifting and denied the City's motion. However, in part because it questioned whether the search of the back-up tapes "would result in the discovery of significant important evidence to support" the plaintiffs' claims, the court limited the plaintiffs' discovery requests by reducing the number of words and custodian mailboxes to search.

Quinby v. WestLB AG

In this case,[8] defendant sought to shift to the plaintiff the costs associated with restoring backup tapes and searching the emails of six of its former employees in connection with an employment discrimination suit. The defendant converted the employees' emails into an inaccessible format (i.e., backup tapes) from an accessible format after it should have reasonably anticipated litigation. The plaintiff argued that cost-shifting was inappropriate because the defendant was required to maintain the data in an accessible format pursuant to its preservation obligations. The court disagreed and stated that the preservation obligation does not require data to be stored in any particular format, including an accessible one. However, the court stated that "if a party creates its own burden or expense by converting into an inaccessible format data that it should have reasonably foreseen would be discoverable material at a time when it should have anticipated litigation, then it should not be entitled to shift the costs of restoring and searching the data." The court also stated that this would not be the case when it was not reasonably foreseeable that the evidence would have to be produced. The court ultimately found that the defendant

should have reasonably anticipated having to produce all of the former employees' emails except for one employee and shifted 30% of the costs to the plaintiff after conducting an analysis under the *Zubulake* factors.

PROACTIVE RECORDS MANAGEMENT

In light of this obvious prevalence of electronic records in employment litigation, employers must craft a retention policy that addresses several straightforward, but key, questions:

- What information is out there?
- Where is it stored?
- What needs to be kept?
- Where should it be stored?
- For how long?
- Then what?

The rationale for a proactive records management policy in Human Resources is not all that different from the incentives to create a company-wide policy. First, for some kinds of records, compliance with the law mandates retention for a certain period. Second, some records will have ongoing business value and thus employers will want to retain them to facilitate departmental operations. Finally, with respect to documents that may be relevant to actual or threatened litigation, a policy must call for the retention of such materials to avoid unnecessary costs or sanctions. In short, a good policy will prevent unnecessary disclosure of corporate records, ensure the availability of records when needed, control discovery costs, and avoid sanctions.

In many cases, an HR Records Management Initiative will be a part of an overall company-wide policy. Many company-wide retention policies establish general retention guidelines for corporate documents, and then defer to each major department within the organization, such as Accounting, HR, and Operations, to determine appropriate guidelines for documents within their part of the organization. This can be a prudent approach, as it permits those groups with specific expertise regarding the types of relevant documents, to determine the method and location of storage of those records. This can insure consistency in retention practices across multiple locations and multiple business units.

NUTS AND BOLTS OF THE POLICY

Scope

The scope of any policy should include all HR tangible documents and ESI, which are accessed on or from Company property or computers. Electronic records should be managed by the same policy as tangible (paper) documents, because retention periods are generally dictated by content, not storage method or location.

Purpose and Goals

The policy should articulate a clear purpose and goals which underscore the importance of records retention to the entire HR department. A sample purpose could be "to establish a program for identifying, retaining, protecting and disposing of HR records." Likewise, goals should be drafted so that, if the policy is reviewed by a judge or jury, the Company's desire to be in compliance with its legal obligations is clear.

Defining Records

For the reasons discussed above, it is important to cast a wide net when defining a "record" within the meaning of the policy. Individual members of the HR department, for example, may not consider their Outlook calendar to be a record, but it can be. The policy should provide some examples of HR-related records, such as:

- electronic mail regarding employee performance issues
- spreadsheets containing compensation data
- contents of the PeopleSoft database
- Outlook calendars

Procedure

The policy should establish a procedure that insures that records are retained for the period of their immediate use, in the appropriate storage location, unless longer retention is required for historical reference, contractual or legal requirements, or for other purposes as set forth in the policy. When records are no longer required, or have satisfied their required period of retention, they should be destroyed in an appropriate manner. There are two key areas of guidance associated with an HR Records Policy: it must designate specific places to store specific materials, and it must identify the retention period for each category of documents.

Storage Location

To reap the benefits of consistency and availability, companies must know, for example, where emails about employee disciplin-

ary action are to be stored. The designated location may be in the HR professional's electronic mail program, filed in a way that associates it with the specific employee in question. Some may choose to require that the email be printed and filed in the employee's paper personnel file. Others may have a secure network share drive for the entire HR department, and may choose to store all correspondence about an employee there. Each Company's information technology infrastructure, and each HR Department's culture and past practices, will help shape the policy regarding appropriate storage locations. For example, certain projects within HR may be staffed with multiple individuals. Storage requirements for the records associated with those documents will have to allow the records to be shared among members of that project team, while still remaining appropriately secured from non-HR personnel.

Retention Period

Likewise, the policy must spell out how long records are to be retained. Certain kinds of records, such as hiring data for federal contractors, payroll data, and I-9 forms, are subject to laws or regulations defining a minimum retention period. Others, like employee disciplinary records, are not subject to specific legal retention requirements, but prudence dictates that an employer retains such records for a sufficient time to use them in the defense of any litigation that may arise.

Records Destruction

Perhaps one of the most important aspects of any records retention policy is a procedure for destroying records once they have passed their useful retention period. Especially in the Human Resources arena, employee files and benefits information for individuals who no longer work at the company can accumulate quickly and storage of such materials can be costly. Moreover, by retaining these kinds of materials when it is no longer necessary, a company is simply increasing the volume of documents it may have to review during litigation. Employment litigation, for example, often relates to the treatment of the complaining party to the treatment of other, similarly situated employees. If a company has retained employee files for separated employees dating back many years, then it may have to produce, or at least review, such records during the litigation. However, if the company has set and followed a guideline to destroy the records of former employees five years after their separation, then the universe of documents to search may be significantly smaller. Thus, consistency in document destruction can be as important as the retention itself.

Methodology

For tangible documents, the method of destruction usually involves shredding, burning or outsourcing to a document destruction service. Electronic records destruction, however, is not so simple. Often the deletion of an active file is merely the removal of one copy of that file. Other copies may exist on backup tapes maintained by the IT department. While the company may be able to argue that searching and restoring these backup tapes is too costly, courts have shown a willingness to require such efforts under some circumstances. If, on the other hand, the tapes were destroyed pursuant to the retention policy, and before any knowledge of pending or threatened litigation, then there should be no dispute.

It is also possible that deletion of a file from a disk does not truly accomplish the deletion. Forensic data analysis can often recover files thought to be deleted. While again this may be the subject of a discovery dispute during litigation (i.e., who pays for the forensic expert), HR departments should work closely with their IT counterparts to insure that an appropriate level of deletion is actually occurring pursuant to the retention policy.

HOLD PROCEDURES

As with other departments in a company, the HR department must insure that it does not delete or destroy any documents that may be relevant to threatened or pending litigation. In other words, when the Company has notice of threatened, potential or pending litigation, investigations or audits, all relevant records must be preserved until final disposition of the action. In employment litigation, HR is often the first line of defense to receive actual notice of threatened litigation. Consider these varying levels of notice:

- Lawsuit from a former employee
- Letter from lawyer to the HR Manager asserting a claim on behalf of an employee
- Notice of an EEOC Charge
- An unemployment compensation hearing with a former employee, in which the em-

ployee claims his termination was because of discrimination

- An angry employee who, upon being notified of his termination, states, "You'll hear from my lawyer"

It is quite conceivable that all of these scenarios are sufficient to put a company on notice of threatened or pending litigation. Thus, both HR professionals and the supervisors they support must be trained to recognize such threats, and to notify appropriate individuals within the organization to insure that records related to the potential dispute are not destroyed or deleted. This internal communication can be critical in helping the company avoid the sanctions described above.

CONCLUSION

The increased importance of electronic information in the workplace will have a profound effect on employment litigation. The first stages of that impact are underway, in the form of the newly-revised Federal Rules of Civil Procedure. These changes create unique issues and opportunities for Human Resources professionals and departments. Without a doubt, the first step for departments is to audit their existing materials, and prepare a thoughtful and realistic records retention policy. ■

NOTES

1. Zubulake v. UBS Warburg LLC, 217 F.R.D. 309, 91 Fair Empl. Prac. Cas. (BNA) 1574 (S.D. N.Y. 2003).
2. Zubulake v. UBS Warburg LLC, 217 F.R.D. 309, 91 Fair Empl. Prac. Cas. (BNA) 1574 (S.D. N.Y. 2003). (emphasis in original).
3. Zubulake v. UBS Warburg LLC, 217 F.R.D. 309, 319, 91 Fair Empl. Prac. Cas. (BNA) 1574 (S.D. N.Y. 2003).
4. Zubulake v. UBS Warburg LLC, 217 F.R.D. 309, 319-320, 91 Fair Empl. Prac. Cas. (BNA) 1574 (S.D. N.Y. 2003).
5. Williams v. Sprint/United Mgmt. Co., 2006 WL 1867478, *1 (D. Kan. July 1, 2006).
6. Turner v. Resort Condominiums Intern., LLC, 2006 WL 1990379 (S.D. Ind. 2006).
7. Semsroth v. City of Wichita, 239 F.R.D. 630, 27 A.L.R.6th 705 (D. Kan. 2006).
8. Quinby v. WestLB AG, 245 F.R.D. 94 (S.D. N.Y. 2006), subsequent determination, 2007 WL 38230 (S.D. N.Y. 2007).