

Strong Litigation Strategy Requires Updated Policies for Remote Workers

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Instant messaging apps and online workspaces offer collaboration and production capabilities for teams dispersed by COVID-19, but they also pose a danger to companies operating in reasonable anticipation of litigation, with “litigation hold” letters in hand, and as parties to pending litigation.

Depending on the issues presented in an anticipated or pending legal dispute, employees seeking to maintain productivity by utilizing online platforms may simultaneously generate discoverable evidence. Once that evidence has been created, the failure to preserve it can lead to tremendously detrimental consequences.

Whether the use of these online workspaces is endorsed by corporate leadership or the product of independent initiative, companies anticipating, preparing for, and engaged in litigation must act diligently to understand how their employees use online workspaces, regulate that use through clearly drafted information governance policies, and ensure that all online workspaces support the well-established duty to preserve electronically stored information (ESI).

“Freemium” products such as Slack, Microsoft Teams, and other online workspaces provide platforms by which employees can collaborate with ease and in real time. However, the free versions of these products may not provide adequate storage for all of the discoverable information generated in the course of that collaboration. Storage limitations can be particularly dangerous when, in the course of litigation months or years later, a company learns of its employees’ use of these platforms and that it failed to preserve discoverable ESI.

Even under more favorable circumstances in which a company endorses and pays for its employees’ use of a premium service offering optimal storage capacity, the danger of lost ESI will remain unless workspace owners affirmatively (and effectively) manage the platform’s settings to ensure proper ESI preservation.

Federal and state judges are empowered to impose sanctions on parties that fail to preserve ESI. Available sanctions include the imposition of monetary penalties, the issuance of jury instructions allowing jurors to infer that the missing information would have been harmful to the offending

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party's case, and the striking of claims and defenses. This is not to mention otherwise avoidable attorneys' fees that parties inevitably incur as a result of clashes over missing, discoverable information.

With or without the challenges of a global pandemic, all parties in reasonable anticipation of litigation owe a legal duty to preserve, and later produce, discoverable ESI. As employees work remotely to protect themselves, their families, and their clients from COVID-19, employers must understand the online platforms being used to maintain productivity, regulate that use with strong information governance, and manage the platform settings to ensure the proper preservation of ESI. Putting these measures in place well before the institution of litigation is strong litigation strategy.

Bailey Glasser's ESI Team is ready to help. Please contact us below if you need assistance on any of these matters.

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Practice Areas

Electronically Stored Information (ESI)