

Litigation Holds in Employment Lawsuits: Creating an Early and Effective Plan for Collecting and Preserving ESI

Best Practices to Reduce Risks, Manage Costs and Avoid Sanctions Under the Amended Federal Rules

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1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

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LITIGATION HOLDS IN EMPLOYMENT LAWSUITS

**Creating an Early and
Effective Plan for Collecting
and Preserving ESI**

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PRESERVATION TRIGGERS AND IMPLEMENTING HOLD NOTICES

- **When Does the Duty to Preserve Evidence Arise?**
 - Notice of future litigation or when litigation is reasonably anticipated
 - **Examples of triggers:**
 - Notice of EEOC charge or other government agency investigation
 - Receipt of demand letter
 - Receipt of preservation of evidence letter
 - Internal complaint of discrimination or unpaid wages



PRESERVATION TRIGGERS AND IMPLEMENTING HOLD NOTICES

- Issuing a Litigation Hold
- Other Times When Preservation Should be Addressed



WHERE TO LOOK, WHAT TO PRESERVE



- Plaintiff's Perspective
- Defendant's Perspective
- How to Preserve

ELEMENTS OF A LITIGATION READINESS AND DOCUMENT PRESERVATION PLAN

- Implementation
- Elements
- Case-Specific Plan
- IT Department Meeting
- BYOD Data



SPOILIATION MOTIONS

- **Triggers for Bringing Such Motions**

- Discovery Uses to Uncover Spoliation:
 - What to seek
 - Who to depose
 - Other sources of evidence



SPOILIATION MOTIONS

- **Standard for Spoliation of ESI**

- Rule 37(e) amended as of December 1, 2015
- Applies to electronically stored information only

(e) Failure to Preserve Electronically Stored Information. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

(1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or

(2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:

(A) presume that the lost information was unfavorable to the party;

(B) instruct the jury that it may or must presume the information was unfavorable to the party; or

(C) dismiss the action or enter a default judgment.

SPOILIATION MOTIONS

- **Threshold Requirements for Spoliation Remedies Under the New Rule**
 - Failure to take reasonable steps
 - Loss of ESI



SPOILIATION MOTIONS

○ Remedies

- Where Prejudice is Shown
 - Admission of evidence and argument about spoliation
 - Preventing spoliating party from putting on certain evidence
 - An instruction to the jury about the loss (not an inference about the lost evidence being unfavorable, etc).
 - Monetary sanctions, including attorney's fees

SPOILIATION MOTIONS

○ Remedies

- Intent to Deprive/Culpable Intent
 - Presume that the lost information was unfavorable to the party;
 - Instruct the jury that it may or must presume the information was unfavorable to the party; or
 - Dismiss the action or enter a default judgment.

SPOILIATION MOTIONS

- Defense to Spoliation Motions
- First-Party Spoliation Claims



Thank You

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