

Avoiding Discovery Disasters

Preserving Evidence in Employment Claims

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Employer must take proactive measures to preserve when:

<p>1. Formal Claim Filed</p> <ul style="list-style-type: none">◦ EEOC/HCRC charge◦ Federal/state court complaint	<p>2. Reasonable Anticipation That A Claim <i>May Be</i> Filed</p> <ul style="list-style-type: none">◦ Credible threat that litigation could occur<ul style="list-style-type: none">• Demand letter• Subpoena for records• Occurrence of an event that <u>typically</u> leads to litigation• Verbal threat of litigation or mention of EEOC/HCRC
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SUMMARY


- A. Fact Gathering: custodians and sources
- B. Document Collection: getting it all
- C. Document Preservation: employer obligations before and after notice
- D. Spoliation: sanctions and avoiding them
- E. Electronic Discovery: basics for employers

A. FACT GATHERING



WHEN LITIGATION LOOMS, ACT

- After issuing a litigation hold, **promptly** start gathering facts to avoid losing vital information.
- Identify custodians: who may have relevant information?
- Identify sources: where may relevant information be stored?



Avoid the common trap of relying exclusively on “management” when conducting a factual investigation

- Doing so could potentially result in the failure to discover material facts and important details.
- If possible, thorough personal interviews of the actual decision-makers and the witnesses to the key events are strongly recommended.

Thorough Interviews

-Interview the key witnesses and decision-makers

-Conduct such interviews as early as possible because delay may result in witnesses' leaving the workplace, discarding relevant evidence, and memory loss.



Leave no stone unturned and maintain easily-accessible records of all interviews, written or otherwise.



B. DOCUMENT GATHERING




The list of discoverable documents is very broad


- › Memoranda
- › Notes
- › Certificates
- › Letters
- › Correspondence
- › Records
- › Tables
- › Charts
- › Analyses
- › Graphs
- › Photographs
- › Videotape film
- › Financial data
- › Schedules
- › Reports
- › Test results
- › Lists
- › Diaries
- › Logs
- › Calendars
- › Messages
- › Questionnaires
- › Bills
- › Agreements
- › Ledgers
- › Receipts
- › Invoices

MOST RELEVANT DOCUMENTS IN EMPLOYMENT CLAIMS

- ✓ Personnel files of employees involved
 - Company Handbook
- ✓ Documents relating to relevant employees' performance.
- ✓ Complaints brought either by the employee making the claim or another employee about the aggrieved employee.
- ✓ Records of similar or related claims by other employees.
- If unequal treatment is claimed, documents relating to other similarly-situated employees is necessary.



Do you know how you are capturing and documenting employees' verbal complaints?




www.CartoonCheck.com

TAAW

"The alarm didn't go off, my car wouldn't start, missed the bus, my back's aching, haven't had a raise in two years ..."

C. DOCUMENT PRESERVATION



An employer who is on notice of a claim or potential claim has an affirmative duty to preserve potentially relevant evidence.

The term "potentially relevant" is vital for two reasons:

The scope of relevancy is broad	Failure to Preserve "relevant" documents may results in sanctions
<ul style="list-style-type: none">› Virtually <u>any</u> material that <u>might</u> cast light on allegations against the employer.› As such, take a liberal approach when deciding relevance.	<ul style="list-style-type: none">› An employer who fails to preserve potentially relevant documents is subject to spoliation sanctions.› Bad-faith destruction is not necessarily required to warrant sanctions.

Employer Proposes, Court Disposes

- You must make preliminary relevance decisions to make preservation choices.
- Only the judge decides what is actually relevant, and that ruling comes after your preservation choices are already made.
- Take a liberal approach in determining what documents may be relevant and what data should be preserved.

Employer Proposes, Court Disposes

- Documents you consider irrelevant may prove important to the court's analysis; legal theories relied on by you or the plaintiff may evolve over time, requiring documentation you initially did not consider important.
- When in doubt, **preserve!**

COMMUNICATE WITH LEGAL COUNSEL




- ▶ Provide your counsel with what you know:
 - Relevant information about the (potential) plaintiff
 - Factual basis, if any, for their allegations
- ▶ Additional context surrounding the issues:
 - Prior disciplinary incidents
 - Prior complaints, by or against
 - Medical or accommodation requests

COMMUNICATE WITH LEGAL COUNSEL



- With this information, you and counsel can:
 - Confirm all relevant custodians and information sources are covered by a litigation hold
 - Identify the personnel and information from which to begin gathering facts
 - Evaluate whether early involvement of an outside vendor may add efficiency and thoroughness

D. SANCTIONS



Spoliation Defined:

- ▶ The destruction OR material alteration of evidence, OR the failure to preserve evidence in pending or reasonably foreseeable litigation.
- ▶ Bad faith is **not** a pre-requisite for sanctions. Accidental or negligent failure to preserve—*i.e.*, honest mistakes—is sufficient.
- ▶ Hawaii courts have wide-ranging authority to impose sanctions for the spoliation of evidence.

Potential sanctions an employer risks if found guilty of spoliation:

- ❑ Monetary Fines (e.g., \$65,000 for deleting files on one laptop)
- ❑ Adverse Inference (i.e., judge tells jury to **assume** the missing evidence would be unfavorable)
- ❑ Court enters admissions against a party
- ❑ Excluding or limiting a party's Evidence
- ❑ Striking some or all of a party's claims or defenses
- ❑ Entering default on one or all of the party's claims
- ❑ Requiring a party to pay the other side's legal fees and expenses
- ❑ Dismissal of the case






Not all spoliation is intentional or motivated by bad faith

- ▶ Courts have little sympathy for accidental or merely negligent failures that result in the loss of evidence that **could have been** relevant.
- ▶ Hawaii Supreme Court: "whether the evidence was destroyed or lost accidentally or in bad faith is irrelevant, because the opposing party suffered the same prejudice."


Destruction of "Potentially Relevant" Evidence Prior to Notice of Potential Litigation

- ▶ Generally, sanctions will not be issued when information is destroyed **prior to any notice to the employer that litigation is possible**, and in a manner consistent with pre-established company retention policy.
- ▶ Employer cannot justify destruction consistent with a document retention policy if the destruction occurred **after** notice of potential litigation.
 - **Lesson:** Immediately suspend routine policies governing how "potentially relevant" documents are to be retained or destroyed

HOW TO BEST AVOID SANCTIONS

1. Implement/improve retention policy
2. Employee education
3. Effective litigation holds

1: Implement a Successful Document Management and Retention Policy



Solid and Consistent Records Management Practices Better Equip an Employer to:

- › Preserve the necessary information for the correct length of time
- › Meet legal obligations faster and more cost efficiently
- › Use technology to improve the records management program
- › Settle disputes more quickly
- › Project an image of good faith, responsiveness and consistency
- › Review, audit and improve its program continuously

Laws Governing Retention

- ▶ No universal law on document retention
- ▶ Important to consider legal and business requirements
 - **Legal:** local, state, federal laws and regulations may mandate that certain documents be kept for a certain period of time
 - **Business:** business practices may require information be kept for a certain period of time

Developing a Documents Retention Policy

- ▶ Determining a retention schedule:
 - Outside of industry regulations and legal requirements, a business need only keep documents and information **as long as necessary for business purposes.**
 - If a policy limits the length of time of retention, the company will have less information to search and review if served with a document request.

Developing a Document Retention Policy

- ▶ Understand and evaluate the records management practices already in place
 - Determine where and how documents and information are kept (*i.e.*, paper, networks/cloud storage, local computer files, scanner/copier memory, *etc.*)
 - Determine backup procedures used (central servers, backup tapes, other imaging systems, third-party recovery service, *etc.*)
- ▶ Determine individuals who may have responsive business documents—and where/how *they* may store them (personal email accounts, cell phones, messaging services, *etc.*)

Retention Policy Provisions

- ▶ A court must be able to *clearly* determine that the policy serves a **legitimate business purpose** and is **not** simply a means for cleansing files prior to litigation.
- ▶ Valid legitimate business purposes:
 - Facilitating easier access to stored information
 - Controlling growth of information
 - Reducing operating and storage costs
 - Improving efficiency and productivity
- ▶ The policy must be flexible to be suspended should a litigation hold be necessary.

Retention Policy Provisions

- ▶ Period of time during which records have value
- ▶ Period of time records are considered to be active and thus maintained in the primary filing area
- ▶ Point in time when records can reasonably be transferred to a secondary storage facility
- ▶ Method of records disposal or disposition
- ▶ Procedures for operating and ensuring compliance with the retention and disposition program
- ▶ Relationship between records retention and other aspects of records management program (i.e., legal hold policy, e-discovery response policy, a data privacy policy, email usage policy)

Email Retention

An employer has a duty not only to preserve business email accounts, but also to preserve potentially relevant emails contained in **personal** email accounts of employees where the employer knows or should know that their employees use their personal email accounts to engage in company business.



WARNING: Courts have found employers guilty of spoliation where the employer has deleted relevant emails from employees' **personal** email accounts.

EMAIL RETENTION

- ▶ Email may be included in the overall document retention policy.
- ▶ Typical features for retaining email:
 - User mailbox size limitations (quota)
 - Automatic deletion of user mailbox contents
 - Extended storage options
 - Restriction on local storage

Enforcement of Policy



Develop enforcement procedures to ensure that all employees follow the policy and its procedures.

Create detailed logs of record-purging and back-up activities.

Periodically review and audit to determine if changes must be made.

2. EDUCATE EMPLOYEES ON THE RETENTION POLICY



Employee Education

- ▶ A retention policy will only be as thorough as employees are familiar with its requirements.
- ▶ Education of employees on the policy should take place long before any claim arises.
- ▶ Provide comprehensive training programs not only when a new policy is rolled-out, but periodically to ensure company-wide knowledge and compliance.

Employee Education

- ▶ Training does not need to be laborious or time-consuming, but it should be periodic and highlight those sections of the policy most relevant to particular employees.
- ▶ Additionally, training managers on how to record employee performance and conduct will aid in keeping control over the document-production process.

3. EFFECTIVE LITIGATION HOLD



Litigation Hold Notice

- ▶ Issuing a proper litigation hold notice—to all of the necessary people—needs to be the very first step taken if the employer anticipates litigation.
- ▶ Do not assume existing retention practices will satisfy this requirement—such practices likely need to be **suspended**, not relied on!
- ▶ The litigation hold notice trumps any standard retention practices that the employer may have in place.

Litigation Hold Notice

- ▶ The employer should issue a copy of the litigation hold memorandum to **any** employee that may have potentially relevant material to the claim or potential claim at issue.
- ▶ Direct communication with key players in the litigation is essential to ensure they are proactively complying to the litigation hold.

Contents of Litigation Hold Notice

- ▶ First, a standard litigation hold notice should clearly state the parties or potential parties in the lawsuit or identify those individuals who may be making a claim.
- ▶ If a lawsuit has already been filed, spell out the exact parties as listed, the court, and the case number.



Contents of a Litigation Hold Notice

- ▶ Second, specify that recipients must retain and preserve certain records, including all documents that may be relevant to the claim or potential claim at issue.
- ▶ Spell out specific categories of documents, information, and/or electronic media to be retained by the employee.



Contents of a Litigation Hold Notice

- ▶ Sample categories of information/documents to include on notice (case dependent):
 - Personnel files including personnel evaluations or documents relating to claimant's work performance;
 - Video recordings of a particular event concerning claimant;
 - Notes taken during any conversations, meetings, or phone calls with claimant;
 - Any contracts that may exist between the employer and claimant;
 - Records relating to payment of wages to claimant.

Contents of a Litigation Hold Notice

- ▶ Litigation hold notice should make clear that it is a **non-exclusive** list.
- ▶ Instruct recipient to preserve any and all other documents or information that the recipient employee may find potentially relevant to the claimant's allegations.

Contents of a Litigation Hold Notice

- ▶ Third, a litigation hold notice should include specific instructions regarding electronic data and databases (*i.e.*, types of electronic data that need to be preserved and the databases that require attention).



Contents of a Litigation Hold Notice

- ▶ Fourth—and importantly—the litigation hold notice should expressly state that any such potentially relevant materials should be preserved **until the notice is formally cancelled in writing.**



Contents of a Litigation Hold Notice

- ▶ A litigation hold takes precedence over the company's normal document retention policy until formally cancelled.
- ▶ The consequences of an employee following retention policy in contradiction with a litigation hold can be disastrous.
 - See *U.S. v. Philip Morris USA, Inc.* (D.D.C. 2004) (imposing \$2.7 million fine against employer and \$250,000.00 fine against each of eleven executives named in lawsuit after e-mails were erased in contravention of an existing litigation hold notice).
- ▶ It is imperative that this be stressed during employee training and highlighted in the preservation notice, if possible.

Contents of a Litigation Hold Notice

- › Fifth, a standard notice can be used to explain what the employee should do if contacted about the litigation or potential litigation.
- › Generally, employees should be asked **not** to speak with any **outside** persons other than the employer's counsel, and to refer any calls or correspondence about the claim to a designated person.



Contents of a Litigation Hold Notice

- › Sixth and finally, the notice should plainly instruct them **NOT** to put into writing—including email or text messages—any discussion regarding the lawsuit or potential claim as it will inevitably be discoverable.



E. ELECTRONIC DISCOVERY

- › An employer that fails to take a proactive approach in systematically capturing and preserving relevant electronic information can fall victim not only to sanctions, but also to e-discovery's burdensome, costly, and time consuming nature.



Scope of e-discovery

- ▶ **Extremely broad.**
- ▶ **Includes:**
 - Email
 - Deleted emails and back-up email files
 - Work processing documents
 - Spreadsheets
 - Graphics
 - Images
 - Audio, video and audiovisual recordings
 - Voicemail messages
- Back-up voicemail files
- Data files
- Back-up and archival tapes
- Temporary files
- System history files
- Website information stored in textual, graphical, or audio format
- Website log files
- Cache files
- Cookies and other electronically-recorded information

Platforms where electronic data may be found

- ▶ Databases
- ▶ Networks
- ▶ Computer systems (hardware and software)
- ▶ Servers
- ▶ Archives
- ▶ Back-up or disaster recovery systems
- ▶ Tapes, discs, drives
- ▶ Laptops
- ▶ Personal computers
- ▶ Internet data
- ▶ Personal digital assistants
- ▶ Handheld wireless devices
- ▶ Mobile telephones
- ▶ Audio systems, including voicemail
- ▶ Tablets
- ▶ Smartphones
- ▶ Electronic scanning and/or copying machines with memory storage
- ▶ Thumb or flash drives
- ▶ Cloud storage or other web-based storage or messaging services

Platforms where electronic data may be found

- ▶ The company's duty to locate and preserve evidence can also extend to electronic data on devices that are not owned by the company.
 - For example, if managers and/or employees send e-mails or texts to each other on their own personal cell phones, the company may still be responsible for locating and preserving those records.

Managing Electronic Information

- › Meet with the company's information technology ("IT") department to learn where and how electronic information is created, stored, archived, and destroyed in the regular course of business.



Managing Electronic Information

- › Work closely with the IT department to ensure consistency in applying the retention policy.
- › For smaller companies that may not have in-house IT-departments, the employer may want to consider reaching out to a third-party vendor to aid in identifying, compiling, and preserving relevant electronic data.



Managing Electronic Information

- › If litigation ensues, a claimant can request in the discovery process that all electronic data be produced in a searchable and manipulable format—often at the producing party's cost!
- › Thus, the employer could save significant costs if, at the outset, it saved and stored electronic information in a format that is searchable and manipulable.
- › Employers should make sure that their IT and/or HR department has a clear understanding of how they are expected to retain electronic information with respect to a former employee—whether that employee was terminated or left voluntarily



CONCLUSION
