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Preservation of Evidence

2020 forced millions of employers to adapt their business models to allow employees to work from home and it looks as if this trend will continue indefinitely for many employers. With this in mind, employers should be aware of certain unintended consequences of having a workforce that telecommutes, namely the creation of additional repositories of electronic data that may be discoverable later in litigation. Given that this is the new normal, businesses should take this opportunity to review and update their data retention and litigation hold policies to ensure that they are meeting their obligations and setting themselves up to be successful should this data be needed in the future. Here are four simple steps you can take now to update your protocols.

1. **Manage Your Policy.** Simply having a policy is rarely adequate. Now is the time to ensure that your policy is properly managed.
 - Designate employees to be responsible for policy management and updates.
 - Understand your jurisdiction's document retention requirements. For example, if your jurisdiction requires payroll records and personnel files to be retained for six years, make sure your policy reflects those mandates.
 - Ensure system migrations are reflected in your policy and data from legacy systems are archived and accessible.
 - Account for employees' use of personal devices. It is important that employees understand that work-related data should not be stored on personal computers and should be saved to their appropriate online or network locations.

If you don't have a data retention policy, now is the time to put one in place.

2. **Know Your Data Inventory.** Most of us know that computers, laptops, and cell phones of current employees hold discoverable information and are subject to document retention policies. But your obligations do not end there.
 - Before reissuing or transferring devices to new employees, have a plan for imaging or storing data found on former employees' computers, laptops, and company-issued phones.
 - Understand who is hosting and managing your online content. This data can be in the form of email, hard copy, cellular, and cloud-based storage. It can

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be shared across platforms such as Office 365, Google apps, DropBox, Sharepoint, PeopleSoft, and Salesforce and even with external sources such as ADP, Paychex, LabCorp, and Iron Mountain.

- Know how to access your data, especially if hosted by third parties. For data hosted by third parties, review your contracts and instructions for document retention. What made sense years ago when you first retained a vendor may not be enough now.
- For data created, hosted, or managed by third parties, have a backup plan. If your vendor loses your data, what plan do you have in place to access that data?

3. **Review Litigation Holds.** Litigation hold notices inform employees of their legal obligation to preserve information that is relevant to litigation and provide instructions on how to preserve relevant data. Litigation hold notices are also an important tool in defending against allegations of spoliation of evidence.

It isn't enough to issue a litigation hold to your IT department with instructions to cease the auto-purge of data or preservation of an email account. You should also send litigation hold notices to your executive team, human resources teams, and any managers or hourly employees who are likely to be witnesses in the litigation or to be required to search for discoverable information.

4. **Document Your Process.** Don't assume that simply issuing litigation hold notices will be enough. Document the steps you take to comply with both your document retention policy and any issued litigation hold notices. A detailed log of the employees interviewed, systems searched, and steps taken to preserve potentially discoverable information will prove invaluable.

With preparation and foresight, employers can ensure that they are set up for success when the need arises. For any questions regarding document retention policies and litigation holds, don't hesitate to contact a Stokes Wagner attorney.

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