

New E-Discovery Rules Take Effect

In-House News:

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By Jen Woods

On December 1, amendments to the Federal Rules of Civil Procedure (FRCP) relating to e-discovery went into effect.

After a five-year review, the Supreme Court approved the changes, which require companies and other parties involved in federal litigation to provide electronically stored information as part of the discovery process, during which both sides of a case share evidence before trial.

The new rules mean U.S. companies will need to know where corporate and personal emails, instant messages, voicemails, and other electronic data are stored in case they are sued.

The changes were implemented because electronic documents, which are vital components of business operations, can be used as evidence during trials. For instance, web-based emails can help prove intent, as well as provide facts. Both corporate and personal email accounts, like those provided by Hotmail and Gmail, can be recovered from users' computers. Also, email attachments that are downloaded to temporary files can remain on a computer's hard drive for a long time.

Like email services, instant messaging programs are available in both

corporate and public formats. Companies can save online conversations, which remain on computers for long periods of time. Deleted conversations can also be retrieved.

Voicemail can also play a significant role in a trial, and voicemail is currently being integrated into other messaging services. For example, voicemail messages can be attached to emails as sound files and transcribed in emails to mobile phones.

Portable devices like BlackBerries and personal digital assistants (PDAs) may also contain information relevant to cases. Such tools can store electronic evidence, including faxes, emails, voicemails, and text messages. In addition, companies' internal systems contain significant amounts of corporate information that can be used as evidence in trials.

According to the new rules, parties involved in federal litigation must address electronic discovery—including how data was saved, forms of production, and privilege issues—during the initial meetings before trials. Anyone, even someone not named as a party to the litigation, may be required to provide electronically stored information.

Locating electronic files and determining whether they contain information pertinent to a lawsuit can be difficult. Counsel might have to work with employers' technical departments to find certain types of electronic data.

Also, according to the new regulations, the party requesting electronic information can specify the format it wants the data in. If the requesting party does not ask for a specific format, the responding party must state the format it

intends to use ahead of time. Therefore, it is important that counsel understand the different formatting options for electronic data.

Counsel will most likely have to work with companies' technical departments to ensure that electronic data is properly saved. In the past, retention policies have not been enforced as strictly for nontraditional sources of electronic data like instant messages, emails, and voicemails as they have been for better-known IT sources.

The new rules also state that a court may not penalize a party if electronic data is lost as a result of routine operation of an electronic information system. Also, the amendments provide guidelines on how companies can seek exemptions from providing data that is not reasonably accessible.

Employers can take steps to avoid losing important electronically stored information. Ford and Harrison, LLP, a labor and employment law firm, recommends developing electronic preservation policies that provide consistent processes for deleting old emails and instant messages.

The firm also recommends that every employer designate one person from the technical department who will be notified when discovery requests for electronic documents are made. This person will also be responsible for ensuring compliance with litigation hold instructions.

To ensure compliance with the new regulations, employers should establish electronic-communications policies and document-retention policies before lawsuits are filed.

On the Net

Supreme Court of the United States

www.supremecourtus.gov

Federal Rulemaking

www.uscourts.gov/rules/newrules4.html

Ford & Harrison, LLP

www.fordharrison.com