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Do You Have an ESI Strategy Yet? Companies and In-House Counsel Sanctioned for Poor Oversight

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Although it has been more than three years since the Federal Rules of Civil Procedure were amended to codify parties' obligations to preserve and produce potentially relevant electronically stored information (ESI), a recent survey conducted by Kroll Ontrack reflects that only 46% of U.S. corporations possess an ESI readiness strategy.[1] Meanwhile, a review of recent judicial decisions on requests for discovery sanctions reflects a growing impatience by courts for a lack of such a readiness strategy and resulting failures to competently preserve and produce potentially relevant electronically stored information.

In *Swofford v. Eslinger*, the United States District Court for the Middle District of Florida recently found the defendants and in- house counsel jointly and severally liable for attorney's fees and costs, and issued an adverse inference sanction, after data on a laptop and emails were destroyed. While in-house counsel had forwarded correspondence from the plaintiff's counsel requesting preservation of ESI to defendant's senior officials, nothing more had been done to ensure the preservation of evidence. The court determined that an award of costs and fees should be imposed against all the defendants, as well as against the defendants' in-house counsel. In so doing, the court noted that in-house counsel had failed "to take affirmative steps to monitor compliance so that all relevant, discoverable information [was] identified, retained and produced."

Similarly, in *Tango Transp., LLC v. Transp. Int'l Pool, Inc.*, a District Court in Louisiana awarded the defendant almost $13,000 in attorney's fees and costs after requested emails were destroyed by the plaintiff. In that case, the plaintiff company failed to issue a litigation hold at the time the complaint was filed, but rather delayed doing so until months later, when the defendant served discovery requests on it. Even then, the plaintiff failed to notify three key employees of the litigation hold until six months after receiving the defendant's request for their production, potentially resulting in further deletions of emails.

In perhaps a worst case scenario, the Washington Supreme Court reinstated a lower court's $8,000,000 default judgment against Hyundai after its search for electronically stored information was improperly limited to its legal departments, resulting in destruction of relevant evidence stored in other departments. The Court noted in *Magana v. Hyundai Motor Am*. that "Hyundai had the obligation not only to diligently and in good faith respond to discovery efforts, but to maintain a document retrieval system that would enable the corporation to respond to plaintiff's requests."

As these decisions make clear, courts' expectations of parties have increased when it comes to preserving and producing electronically stored information, as have the potential ramifications for failure to do these things competently and effectively. While issuing a litigation hold is a necessary step once a company receives notice of or reasonably anticipates litigation, a litigation hold, by itself, is frequently insufficient to avoid sanctions where ESI is nonetheless destroyed. Thus, companies are well advised to review their readiness and develop a protocol for preserving and producing ESI before they become involved in litigation.

The development of an effective ESI readiness strategy should involve a thorough review of the company's electronic information systems, including networks, computers, email, voice mail, cell phones and handheld devices issued to employees, video surveillance, back up systems and potentially even ESI in the control of vendors and contractors providing outsourced services, to determine how and where information is stored. A

review should also be conducted of the company's policies on data preservation and deletion, and a strategy developed for determining the steps necessary to stay deletion and effectively preserve ESI once the company receives notice of or reasonably anticipates litigation. These steps will require focus on the content of a litigation hold notice, those who should receive it, as well as the scope of the information to be preserved. Both the development and implementation of such a strategy will likely require the participation of those who manage the company's information technology systems, as well as its in house and external counsel.

Baker Donelson stands ready to assist you with these and other employment-related challenges. For assistance, please contact your Baker Donelson attorney or any of our more than 90 attorneys practicing labor and employment law, located in *Birmingham, Alabama; Atlanta, Georgia; Baton Rouge, Mandeville* and *New Orleans, Louisiana; Jackson, Mississippi;* and *Chattanooga, Johnson City, Knoxville, Memphis and Nashville, Tennessee*.

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[1] *See* Kroll Ontrack's Third Annual Electronically Stored Information (ESI) Trends Survey, available at http://www.krollontrack.com/CLU-practice-points-1209/?news=US_CaseLaw_Dec_09_http.