

FYI, Text Messages and IMs Are Discoverable Too

Labor & Employment Law Update

on April 12, 2018

Back in November we reported on a federal judge ordering several members of management to turn over messages from their personal email accounts and counseled employers to be proactive in managing employees' use of personal email for company business. The guidance set forth there rings true for text messages and other forms of electronic communication (e.g. WhatsApp, Slack, Trello and myriad others) as well.

As we explained in our prior post "document production" encompasses not only "documents" in the traditional sense, but all relevant information "stored in any medium" along with its metadata. To be fair, private entities are not required to retain every communication or even every document generated in the course of conducting business. But certain communications are subject to retention regulations and knowledge that litigation is "reasonably foreseeable" triggers a separate and distinct obligation to retain *all* information relevant to the potential dispute.

Companies that fail to preserve information once an obligation to do so arises run the risk a court will issue a "spoliation instruction" which allows the jury to *assume*, based on the fact that a party failed to retain relevant evidence, that the evidence it lost or destroyed must have been unfavorable to that party's position in the litigation. Not a comforting thought for any business.

So, how does a company square the need to keep pace in today's world of lightning-fast communication and also avoid falling victim to claims of spoliation?

1. **Electronic Communications Are Business Records.** Remind employees all communications – including text messages and electronic communications sent via messaging apps — are official business records subject to retention policies and discovery in the event of litigation.
1. **Review your Litigation Hold Notice Form.** Make sure it covers not only documents in the traditional sense, but also email, text messages, instant messages, and other forms of electronic communication.
1. **Regulate and Police How Your Employees Communicate.** Publish clear policies addressing when texting and other forms of electronic communications are appropriate and when they are not. Can an employee text his/her boss if s/he is going to be late? Is it appropriate for sales

personnel to negotiate terms with customers by text?

1. **Involve IT Professionals.** Enlist the help of IT professionals to safeguard electronic communications the organization is required to retain and to establish protocols that will allow you to quickly capture communications (along with their metadata) that are relevant to actual or potential litigation when the need arises.

FYI, Text
Messages
and IMs Are
Discoverable
Too