

E-Discovery Preservation: What to Consider as Offices Open Back Up from COVID-19

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Businesses are beginning to determine what it means to open their spaces back up and let their employees come back in to the office. But, what does this mean from an e-discovery perspective?

Let's rewind a bit. In mid-March, businesses were given little time to prepare to shut down their offices. In many cases, employees were given short notice to pack up what they needed to work from home and probably began using whatever devices they had. So, immediately, employees began to use their cell phones instead of their office phones. Some began to use their personal computers instead of, or in addition to, their office computers. And what about those thumb drives that were laying about the house? Yes, they started to use those too.

So what? Well, business did not completely shut down over the past few months and the documents employees created, accessed, and used during this time may become discoverable in later litigation. Like no time before, employees used their personal devices to do company business, and those personal devices will likely be discoverable in litigation. This will inevitably raise questions about whether those devices are in the "custody, control or possession" of the company, especially for employees that have departed the company. But, that is a fact determination based on the particular circumstances and roles of the employees, and a topic completely of its own.

Instead, let's consider what will need to be preserved and possibly collected in the event of future litigation. The best way to determine what needs to be preserved and collected is to ask the employees. Did they use personal laptops for work business? And if so, is there data saved on those laptops related to the work business? Whether the laptop and its contents need to be preserved and collected depends on the answers. In many cases, employees use their personal laptops as merely a portal to access on-line work accounts. If that is the case, and there are no documents on the personal computer, preservation and collection are likely not necessary. But, the questions need to be asked.

The same can be said about any external hard drives or cloud storage. The best way to determine what needs to be preserved and collected is to ask employees where they stored documents while they were working from home, and if they used any external hard drives, personal cloud drives, or any other storage media not maintained by, or even known to, the company.

Cell phones will be the treasure trove of potentially relevant data. Obviously, we expect to see an increase in relevant texts. If people have been reducing their activity, location data will likely be uninteresting. But, call history could be a valuable source of information like never before. When people worked in the office, cell phone use was hit and miss. Sometimes, people used their office phone and sometimes people used their cell phones. So, call logs were sometimes useful, but not essential, and they didn't show a complete picture. Now, with people relying almost exclusively on their cell phones, every phone call – in or out – has been

logged. Who made each call and how long it lasted is maintained for every call. This will likely be a valuable source of information that has been only moderately valuable before.

And what about the technologies whose use exploded during this time? That's right, what about your Zoom meetings, Google Meets, and Microsoft Teams video calls? Each one of those applications has the ability to record the meeting. Have any business meetings been recorded? If so, where are the copies? Who has them, and who is responsible for maintaining them? It is better to ask these questions now, while it is fresh on everyone's mind, and so it doesn't sneak up on you later.

Though there are a lot of considerations going on now, preservation of potentially relevant documents is not high on the list. But, it should be. The easiest solution is to make this part of the process to re-enter the workplace. Businesses should instruct their employees that as they close down their work-from-home office spaces, employees should move all of their work documents back to computers maintained by the business. Not only will this facilitate the use of these documents in the day-to-day business, but this will help the business keep track of its documents should there be legal issues down the road: employment, contract, trade secrets, etc. And, as for cell phones, they are still a valuable source of electronic discovery – just more so now.

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