

Top 10 Considerations: Document Retention and E-discovery in the Remote Work Environment

The remote work environment has caused a surge in the use of emerging technologies such as video conferencing and messaging apps like Zoom, Microsoft Teams and Slack.

Using these emerging technologies can create new obligations and considerations that need to be taken into account when crafting document retention policies and addressing electronic discovery in active cases and investigations, as a “one size fits all” approach will often not suffice.

Top 10 Considerations:

1. Determine the different technologies that employees are using remotely and whether those technologies are set to preserve electronically-stored information (ESI) for a sufficient period of time for document preservation purposes.
2. Consider updating document retention policies and litigation holds to address the use of video conferencing and messaging platforms that are used to create and store ESI.
3. Based on the business needs of the company, create a retention period for all employees that is based on the type of technology platform being used and the needs of the company to retain such ESI.
4. For new platforms being used for working remotely, consider paying for versions that allow for adjustments to their retention periods and the downloading of data on request that preserves metadata (i.e., the data within the data) if possible.
5. Slack and other messaging platforms are fair game for e-discovery in lawsuits. Courts require that reasonable steps be taken to preserve such ESI, and, accordingly, e-discovery requests need to include references to this type of ESI and collection and preservation steps need to be taken to include this type of ESI.

Litigation + Dispute Resolution

6. Ephemeral Messaging applications like Snapchat and Wickr that are designed to only store messages for a short period of time are also now being used to conduct business.
7. Archival tools may be used to collect and store information whether by app makers or by third-party technology providers. Purchasing such tools may well be worth the upfront costs by creating significant savings down the road in connection with preservation and collection.
8. Metadata may not be available in ESI created from these emerging technologies, but if metadata is retained, reasonable steps need to be taken to preserve it if it is responsive to discovery in an ongoing lawsuit or investigation.
9. Some of these new platforms do not store data the same way as typical email platforms. The messages may be stored by channels or teams rather than by subject matter or author, creating different challenges in their preservation and collection.
10. The failure to take reasonable preservation steps can lead to sanctions in ongoing cases and potential civil and criminal liability in ongoing government investigations.

For More Information

Please contact the attorneys listed below or the Davis+Gilbert attorney with whom you have regular contact.



Marc J. Rachman
Partner, Litigation
212 468 4890
mrachman@dglaw.com



Derick D. Dailey
Associate, Litigation
212 237 1460
ddailey@dglaw.com