

NEW RULES ON ELECTRONIC DISCOVERY NOW IN EFFECT

Amendments to Rule 26 of the Federal Rules of Civil Procedure pertaining to the exchange of electronic data during the course of litigation went into effect on December 1, 2006. The new rules substantially alter prior practice by requiring any employer involved in a lawsuit to exchange detailed information about electronic data – including how it is stored, what the retention policy is, and whether the data is reasonably accessible.

The changes in Rule 26 require counsel for both sides to meet at the outset of litigation to discuss the exchange of electronic information, commonly referred to as “e-discovery.” Previously under Rule 26(f), the parties were required to confer to decide only such issues as the timing and scope of discovery, and whether they agreed to waive some of the initial disclosures required under Rule 26(a).

Under the amended Rule 26(f), counsel must be prepared to discuss “any issues relating to the disclosure or discovery of electronically stored information, including the form or forms in which it should be produced.” Explanatory notes that accompany the new rules add that this conversation should cover:

- Specific databases that may contain discoverable information;
- The ease with which the databases can be searched;
- Whether certain databases cannot be searched in a cost-effective manner; and
- Issues revolving around preservation of data in light of the litigation.

The notes comment that the extent of the discussion will vary depending on, among other things, the dimensions of the case and the extent to which electronic data is likely to shed light on the facts of the case.

Employers should take stock of what electronic data they have and how it is processed, stored, and backed up. Statistics suggest that employers who do not take steps in advance will pay for it later in the form of fees to lawyers and information technology consultants.

Data affected include:

- E-mail
- Word-processing documents
- Voicemail
- Faxes (from a fax server)
- Instant messages
- Calendars
- Spreadsheets
- Charts and graphs
- Scanned images
- Video
- PowerPoint presentations
- External hard drives
- Deleted items
- Archived e-mail and other data
- Tape back-ups

Once an employer becomes involved in litigation, counsel must get familiar with all of the employer’s existing databases and document retention policies. Counsel must also understand how the databases can be searched, what is still accessible, and what is privileged by virtue of being proprietary or a trade secret.

Obviously, the more organized and coordinated employers are in advance of litigation, the more efficiently they and counsel can prepare for the Rule 26(f) conference regarding electronic data discovery. Less-organized employers may have to call on IT consulting firms, at some expense, to help them identify and search relevant databases.

An appropriate first step for any employer is to establish a committee of employees representing IT, management, and human resources to develop a retention policy if none exists and to survey the databases in place. This committee should also be able to send out an effective notice freezing the deletion of any data or databases that may be relevant to litigation once the litigation had been filed – and even before that time if the litigation could be reasonably anticipated.

While these new rules have not been in place for long – and the actual practice that evolves from them is, as yet, unknown – there is no doubt of one thing: The new focus on electronic discovery will require employers to be more proactive about staying on top of their electronic information.

This Employment Law Update is published as a service to our clients and friends. It is intended to be informational and does not constitute legal advice regarding any specific situation.

N|P Employment and Labor Law Group

CHARLESTON
843.577.9440

Joshua L. Ellis
George Finnan
Molly Hughes

CHARLOTTE
704.339.0304

Alex Barrett
Beth Langley

COLUMBIA
803.771.8900

Mike Brittingham
David Dubberly
Susan Edwards
John Emerson
Vickie Eslinger
William Floyd
Joan Hartley
Roshella James
James Leventis
Regina Lewis
Angus Macaulay
Susi McWilliams
Nikole Mergo
Sue Odom
Sam Painter

GREENSBORO
336.373.1600

Alex Barrett
Brian Clarke
Beth Langley
Peter Pappas
Bill Wilcox

GREENVILLE
864.370.2211

Grant Burns
Jamie Hedgepath
Leon Harmon
Rusty Infinger
Will McKibbin
Michael Pitts
Tom Stephenson

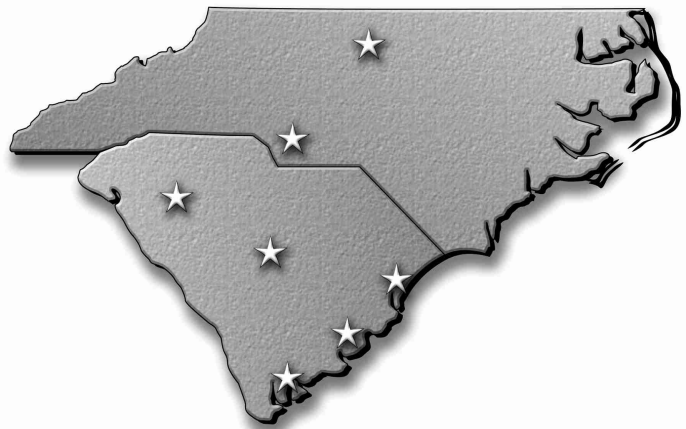
HILTON HEAD
843.689.6277

Melissa Azallion

MYRTLE BEACH
843.720.1724

Molly Hughes

NEXSEN | PRUET
ADAMS KLEEMEIER



The Carolinas Law Firm