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CLIENT BULLETIN

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Is the EEOC Setting up Employers for Spoliation Claims?

An Editorial
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An office of the U.S. Equal Employment Opportunity Commission has issued a **"Document Retention Notice"** that appears to be designed to turn meritless cases into spoliation claims. This is another example of how the EEOC has turned itself into a prosecutorial agency with no real pretense of impartiality. Employers need to respond accordingly.

The Document Retention notice, isued by the EEOC's St. Louis office, goes far beyond the legal duty to preserve relevant evidence described in judicial opinions, has no basis in statutory or regulatory authority, and disregards the well-established legal rules concerning balancing burdens and benefits. Although the St. Louis office probably will claim the notice does nothing more than reflect existing law, this is simply not correct. The notice appears designed to make it possible for the EEOC to try to claim employers have failed to identify and preserve relevant evidence even where charges are frivolous.

All persons, natural and corporate, have a duty to preserve relevant evidence when claims are made. Importantly, this includes the person making the charge, a fact most employment lawyers don't pay attention to. Traditionally, the employer had most, if not all, of the relevant records. Today, however, with the explosive growth of social media, email, texting and tweeting, the employee or former employee making the allegations almost certainly has lots of relevant documentation.

Employers who receive notice of charges, whether in a lawyer's letter, a formal notification from a governmental agency, service of a complaint and sometimes even just orally, have a duty to locate and preserve relevant evidence. In the last few years this duty has given rise to a whole new collateral form of litigation and a cottage industry of document preservation and forensic computer examination. While we usually think of this in connection with huge corporations slugging it out in commercial or intellectual property litigation, the duty exists in every case. That is why your lawyers routinely send you letters advising you to identify and preserve evidence, paper and digital. Unfortunately, many employers disregard those letters or make a minimal effort. That can be very costly.

The EEOC is now raising the stakes. For the first time, the EEOC (at least, the St. Louis Office) is issuing its own document retention notice. Although the agency cer-

tainly will claim a benign motive, the effect of the notice is to intimidate the employer and to encourage paying off the charging party in the EEOC's own mediation process regardless of the merits of the charge. You can be assured the mediators and investigators will remind employers of the costs, distractions and risks associated with document retention early and often while trying to get you to pay money to resolve the charge.

Employers should read this notice and confer with counsel. Employers should comply with their actual legal duties to preserve relevant evidence but should not let the EEOC try to create obligations that don't exist and should not let the EEOC's attempt to intimidate go unchallenged. Employers should seriously consider sending a document retention instruction letter of their own to the EEOC and to the Charging Party whenever the EEOC issues this sort of form.

Unfortunately, many people in the EEOC have decided to become prosecutors instead of compliance officers. The EEOC has taken many steps recently (including, for example, scheduling a "factfinding conference" and demanding the employer send someone with settlement authority--I think not) demonstrating the complete lack of impartiality. The National Labor Relations Board has for years demanded employers provide affidavits, and for years employers have refused because the affidavits will be used against them. Everyone in the labor law community understands the unwritten rules. Well, we now have to plan to deal with the EEOC in much the same way.