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The Top 10 Ways To Reduce Discovery Costs: Nos. 5-1

December 20, 2012 | | Traditional Labor,Labor And Employment

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Yesterday we posted Part I of the article, "The Top 10 Ways to Reduce Discovery Costs: Nos. 10-6." You can read the article by clicking here . Today, we complete our list by featuring the top 5 ways to reduce discovery costs.

5. ***Don't Destroy Evidence.*** No responsible employer would intentionally destroy evidence. The problem, however, is that responsible employers can have irresponsible and/or negligent employees. Accordingly, all employers should have procedures for advising their employees of reasonably anticipated litigation so that the company properly preserves necessary evidence, as well as procedures to make sure that the process is followed.

4. ***Pick Your Battles.*** Having principles are fine, but fighting over principles costs money. Consider what is important with respect to discovery in a case and really worth fighting over, and separate those items from the things that

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simply are a nuisance. While what is important will obviously depend on the facts of a particular case, some things that immediately come to mind as worthy of the utmost protection would be materials created in anticipation of litigation, attorney-client privileged communications, trade-secrets, and sensitive information concerning company employees, customers and products.

3. ***Only Have One Cook In the Kitchen*.** Employers should have a single point of contact that their outside counsel can work with to address discovery issues. Preferably this should be someone in the employer's legal department, HR department or in management – a person with sufficient authority to get items that may be needed and who can ensure that things get done promptly. This streamlines the process and avoids duplication of effort and inefficiencies.

2. ***Survey the Landscape*.** A lot of the leg-work done by outside counsel in terms of collecting documents for discovery can be dispensed with by getting on top of certain standard information as soon as the employer gets wind of litigation. The plaintiff's personnel file, relevant employment policies and procedures, information on the individual(s) who made the challenged decision and information on the plaintiff's peers or those who would be viewed a similarly situated almost always will be necessary to the defense of an employment case. There is no need to pay outside counsel to spend time hunting down these basic materials when the employer easily can compile them cheaply on the front end. Such documentation should be part of the standard packet of items sent to outside counsel when they are first retained. Not only will this reduce time and money in the discovery process by eliminating a lot of the typical back and forth about files, but it also will make the case that much easier to defend if the company's lawyers can get a comprehensive picture early on of the lay of the land.

1. ***What You Do Now Echoes In Eternity (a/k/a the "Gladiator" Rule)*.** It has been drilled into HR professionals for decades to "document, document, document." While this certainly is important, it also however, is only partially true. What is essential is not to blindly document *everything*, but to document what is important. Needless documentation (*e.g.* unnecessary emails, notes or memoranda concerning an employee) can open up additional avenues for discovery that would never have existed had these unnecessary items not been created and maintained in the first place. Employers need to differentiate between what is important and what is not important, and to educate their supervisors accordingly. So document, document, document? Sure, but *think* before creating records that are not part of the regular course and scope of business, are unnecessary with respect to managing the workforce, and will just trigger an unnecessary (and potentially costly) discovery expedition.