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newsletter

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DAVID K. SCHMITT, ESQ.

BARBARA L. YONG, ESQ.

MARGARET A. GISCH, ESQ.

CAREN A. LEDERER, ESQ.

LIAT R. MEISLER, ESQ.

OWEN P. QUINN, ESQ.

LAURA A. BALSON, ESQ.

(not pictured)

EVY YAO, PARALEGAL
DAVID YOUNG, PARALEGAL

GOLAN & CHRISTIE'S LITIGATION TEAM

BUSINESS LITIGATION CLIENT ALERT

BY LAURA A. BALSON

In light of recent changes to the Federal Rules of Civil Procedure and recent severe sanctions handed down to businesses based on their document retention policies and behaviors, Golan & Christie LLP believes that our business clients should evaluate their electronic data storage and retention practices. Any member of our litigation staff would be happy to assist you if you have any questions related to the issues raised in this article.

NEW FEDERAL RULES REGARDING ELECTRONIC DOCUMENTS

Electronic Discovery (also known as "E-discovery" or "E.D.") is more complex today than ever before. As an example, Rule 26(b)(2) of the Federal Rules of Civil Procedure was recently amended to create two categories of electronically stored information: "reasonably accessible" and "inaccessible." For information that is reasonably accessible – meaning data that can be accessed by a user or member of the information technology staff, without the help of computer forensic specialists – all relevant data sought through E-discovery must be produced at the cost of the producing party. For information that is inaccessible – meaning that the data can only be obtained with the help of recovery programs - a party may withhold the data because of undue burden or cost of production, but only with a demonstration of why the information is inaccessible. However, even if the information is determined to be inaccessible, a requesting party may be able to get around that classification with a showing of good cause. In such instances, the court will consider a list of factors to determine whether the cost of production should be shifted to the requesting party. It is important to note that courts will not look favorably on parties that have made data inaccessible due to their method of preservation. The producing party does not have an explicit duty to preserve evidence in an accessible format. However, after litigation is reasonably anticipated, the producing party will bear the cost of producing any evidence preserved in an inaccessible format. *Quinby v. WestLB*, 2006 WL 2597900 (S.D.N.Y. Sept. 5, 2006) and *Joint Venture v. United States*, 75 Fed. Cl. 432 (Feb. 28, 2007).

RECENT CASE LAW DEVELOPMENTS

Courts are increasingly less tolerant of parties who do not cooperate in the discovery of electronically stored information. As phrased by one federal judge in Washington D.C., addressing a defendant who was unwilling to pay the costs of creating an image of certain hard drives requested by the plaintiff, "The producing party is not relieved of its obligation to produce accessible data merely because it may take time and effort to find what is necessary." *Peskoff v. Faber*, 240 F.R.D. 26 (D.D.C. Dec. 21, 2007). Other courts have been even more harsh in the consequences that they have handed down to parties whom they believed had not taken sufficient action to prevent the destruction of electronically stored information. In the landmark *Zublake* decision, the judge instructed the jury in an employment discrimination case that they should make an "adverse inference" against the employer and assume that any missing documents or data was damaging to the employer's defense. In other cases, judges have awarded costs up to $1,000,000 against parties that were unable to adequately defend deletion of electronically stored information.

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TIPS TO AVOID A CLAIM OF SPOLIATION

The volume of information that a company may have stored electronically can be enormous. Unlike information stored in paper formats, electronically stored information is more difficult to dispose of. It is dynamic in a way that makes it capable of change even without human intervention and the consequences of improper retention and storage can have severe consequences. Following these tips will help to avoid an accusation of intentional destruction or spoliation:

1) Adopt policies and programs that provide rational and defensible guidelines for managing, storing, and disposing of electronically stored information. These guidelines should consider the business, regulatory, tax, and infrastructure needs of your particular organization. Any such program must also include provisions for legal holds to preserve electronically stored information related to ongoing or reasonably anticipated litigation, governmental investigations, or audits.

2) Be aware of all activities that can change or destroy electronically stored information such as running anti-virus or spyware software, defragmentation, and system updates or patches. One point which even technologically savvy business people may not consider is that updating or installing new software on a computer can have the effect of rewriting certain data and making it irretrievable, such that if your company decides to install a new operating system (such as Windows Vista, as an example), and you are in reasonable anticipation of litigation, you may be guilty of spoliation of evidence.

3) Take steps to ensure employee compliance with all policies and programs, at every level. Courts will consider not only a company's stated policies but also the extent to which these policies are actually followed in real life. It may be that one employee who likes to work from home has a personal practice of downloading files every evening to a personal thumb drive, even though such a practice is not authorized in the company's electronically stored information policy. If the president of the company assures the court that no other sources of electronically stored information exist beyond what has been disclosed, and the thumb drive is later uncovered, it is the company that would suffer the consequences of that difference between policy and practice in reality.

4) Finally, and most importantly, be prepared to deal with electronically stored information well in advance of any litigation. Become as knowledgeable as possible by talking to your information technology staff members about what information exists, how it is stored, and how it is indexed. As with many things, in the world of Electronic Discovery, an ounce of prevention is worth more than a pound of cure. •

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GOLAN & CHRISTIE LLP
ATTORNEYS AT LAW

70 WEST MADISON STREET SUITE 1500 CHICAGO, ILLINOIS 60602-4206
PHONE (312) 263-2300 FAX (312) 263-0939 GOLANCHRISTIE.COM

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ILLINOIS AMENDS LIMITED LIABILITY COMPANY ACT TO ALLOW FOR "SERIES" LLCS

BY DARRIN S. BAIM AND DIANA M. MACKLIN

Over the last few decades, the limited liability company ("LLC") has rapidly become one of the most common business forms in the United States, based in large part on its ability to afford its owners management flexibility, the option to elect "passthrough" tax treatment similar to a partnership, and liability protection. However, regardless of business form, in order to maximize liability protection it is important to segregate assets of varying natures and degrees of risk in order to prevent creditors from seizing all of the assets held by one entity.

Until recently, the only way to accomplish such segregation through the use of an LLC in Illinois was to create a separate LLC for each distinct business, asset and/or group of assets. While this protected each business/asset from the liabilities and risks associated with other businesses/assets, it also required multiple start-up and formation costs, as well as high administrative and maintenance costs. However, an alternative means by which to achieve such segregation was created on August 16, 2005, when the Illinois LLC Act was amended (the "Act") to authorize the creation of "series" LLCs ("Series LLCs").

A Series LLC is formed by: (1) filing Articles of Organization with the Illinois Secretary of State which provide notice that the liabilities of each individual series are limited to the assets of the applicable series; (2) filing a Certificate of Designation with the Illinois Secretary of State for each series; and (3) explicitly providing for limited liability for each series in the Operating Agreement. In addition, in order to ensure limited liability protection each series must: (1) maintain separate and distinct records; (2) hold its assets separately; and (3) account for its own assets separately. If the above requirements are met for each series, the Act provides that "the debts, liabilities and obligations incurred, contracted for or otherwise existing with respect to a particular series shall only be enforceable against such series and not the LLC generally or any other series."

Although the Series LLC concept is relatively new, the Act gives some guidance on the separate nature and treatment of a Series LLC. The Act states that a "series with limited liability shall be treated as a separate entity … [and e]ach series with limited liability may, in its own name, contract, hold title to assets, grant security interests, sue and be sued and otherwise conduct business and exercise the powers of a limited liability company." Additionally, the Act allows the Series LLC and any of its series to elect to: (1) consolidate their operations as a single taxpayer to the extent permitted under applicable law; (2) work cooperatively; and (3) contract jointly or elect to be treated as a single business for the purposes of qualification to do business in Illinois or any other state.

Although the Act clarifies some uncertainties associated with a Series LLC, the concept of a Series LLC remains a novel concept and scant case law or authoritative commentary exists to interpret how the entity will be treated by the courts or the Internal Revenue Service. Some of the primary questions that have yet to be answered are the following: (1) Will the courts uphold the broad liability protection for each series as contemplated by the Acts? (2) Will third parties (like lenders and insurance companies) be comfortable providing services to a Series LLC? (3) How will bankruptcy courts treat Series LLCs? and (4) Will each series be treated as a separate entity for tax purposes, requiring each series to obtain separate employer identification numbers (EINs) and file separate tax returns?

Unfortunately, the administrative efficiencies that may be obtained through the use of a Series LLC are likely outweighed by the risks and uncertainties surrounding this new business form for most clients. However, if you would like to discuss the series LLC concept or if you have questions regarding alternative business forms, please contact either Anthony R. Taglia, Darrin S. Baim or Diana M. Macklin at (312) 263-2300. •

DARRIN S. BAIM

DIANA M. MACKLIN

EMPLOYMENT LAW ALERT

NEW "SAFE HARBOR" RULE FOR EMPLOYERS WHO RECEIVE A SOCIAL SECURITY NO-MATCH LETTER

On August 15, 2007, the Department of Homeland Security (DHS) and the Agency for Immigration and Customs Enforcement (ICE) amended the regulations relating to the employment of unauthorized or undocumented aliens. A "Final Rule" describes the legal obligations of employers upon receipt of a no-match letter from the Social Security Administration (SSA) or a letter regarding employment verification forms from the DHS. A no-match letter is a notice that an employee's name or social security number listed on that employer's W-2 does not match the SSA's records.

The Final Rule also describes "safe harbor" procedures that employers can follow in response to such letters. Under these procedures, upon receipt of a "no-match" letter, an employer should:

1) Check to see whether the discrepancy is the result of clerical error and if so, notify the appropriate agencies within 30 days;

2) If not clerical error, contact the employee to verify that the documentation is correct and if not, correct the information; and

3) If the discrepancy is not resolved within 90 days, complete a new I-9 form, within 3 days of the 90 day time period, as though the employee were newly hired, but utilizing documents that contain the employee's photograph and do not contain the SSN that was the subject of the no-match letter.

By following these three steps, an employer falls within the "safe harbor," cannot be deemed to have constructive knowledge of an unauthorized worker, and thereby avoids significant fines. At the present time, there is an injunction barring enforcement of the provision within the Final Rule for termination of employees who are unable to correct the documentation error, but the DHS has promised to move forward as soon as possible.

HAVE YOU FILED YOUR 2007 EEO-1 REPORTS?

The Equal Employment Opportunity Commission ("EEOC") has published new requirements for employers who are required to complete EEO-1 Reports.

What is the EEO-1 Report?

The EEO-1 Report is a government form requiring many employers to provide a count of employees by ethnicity, race, and gender.

Who must File?

- Employers with 100 or more employees AND/OR
- Employers with 50 or more employees and federal government contracts of at least $50,000.

What was Changed?

- Previously, employers were prohibited from asking employees to identify their race or ethnicity when compiling information for use in the EEO-1 Reports.
- Now, the EEOC requires employers to ask employees to identify their race or ethnicity when filling out the EEO-1 Reports.
- The EEOC also has changed some of the definitions for the race and ethnic categories.

How do Employers Comply?

The EEOC recommends using a survey which allows employees to self-identify. The survey must include language that informs employees of certain rights, such

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as, among others, the right to refuse to provide the racial/ethnic information. The survey must also inform employees about the duties of the employer, such as the duty to maintain the confidentiality of the information.

Though the filing deadline for 2007 was September 30, 2007, it is not too late to file, if you have not done so already.

How Important is the Survey?

Very. Now that employees are being asked to identify their own race/ethnicity, employers must provide a way for them to do so in a format that both complies with the EEOC's new definitions concerning race and ethnic categories and includes the required language.

NEW FEDERAL MINIMUM WAGE WITH NEW POSTING REQUIREMENT

Since July 24, 2007, the federal minimum wage for covered nonexempt employees has been raised to $5.85 per hour. Beginning on July 24, 2008, that amount will be raised to $6.55, and beginning on July 24, 2009, that amount will again be raised to $7.25.

All employers of employees subject to the Fair Labor Standards Act's minimum wage provisions are required by law to post a notice of the Act's requirements in a conspicuous place on their premises. If your workplace posters are out of date, they need to be updated now. Free temporary posters can be downloaded online, and permanent posters are available for sale at reasonable prices. If you would like us to assist you in obtaining these posters, please let us know.

COURT SAYS EMPLOYEE HANDBOOK VIOLATES THE NATIONAL LABOR RELATIONS ACT

On March 16, 2007, a federal appeals court in *Cintas Corp. v NLRB* found that an employer's handbook contained a confidentiality policy which violated the employees' right to organize a union, as protected by the National Labor Relations Act. In light of this decision, employers – even non-union employers – should review their confidentiality and communication policies in handbooks and/or employment agreements, and determine whether employees could reasonably construe such policies to restrict them in their discussion of wages or other terms and conditions of employment with other employees (or union representatives). If so, employers should consider revising them and, in doing so, should consider the court's admonition that "[a] more narrowly tailored rule that does not interfere with protected employee activity would be sufficient to accomplish the Company's presumed interest in protecting confidentiality." The employment lawyers at Golan & Christie LLP are available to assist in drafting new handbooks and reviewing old handbooks for a wide range of issues. •

TO LEARN MORE...

The employment attorneys at GOLAN & CHRISTIE LLP provide day-to-day employment counseling and dispute-resolution advice on a wide range of issues that face employers. If you would like additional information, please contact:

MARGARET A. GISCH
312.698.2039
magisch@golanchristie.com

or

LAURA BALSON
312.601.8853
labalson@golanchristie.com

IN OUR NEXT ISSUE...

- **Alert:** Employee Classification Act becomes effective on January 1, 2008.
- **Alert:** New amendments to the Illinois Human Rights Act go into effect on January 1, 2008.

OUR FOCUS IS YOU

Putting our clients first is not just a slogan for Golan & Christie. Everything we do stems from your needs, goals and objectives.

From the moment we first meet, we are driven by one thing: your ultimate success. And we go the extra mile to achieve it.

We devote as much time as necessary to get to know you. Only then can we make a thorough assessment of your situation and develop solutions that are the most appropriate for you. As our team goes to work for you, we continue to invest time in listening to, observing and advising you.

In the end, we measure our success by your success.

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OUR PRACTICE

Our practice covers many aspects of law and business, with an emphasis on the areas listed below:

- Business Law & Governance
- Commercial & Corporate Litigation
- Commercial Real Estate
- Employment Law
- Estate Planning & Taxation
- Finance
- Reorganization & Bankruptcy

newsletter

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