



NEWS BRIEFS

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YOUR LEGAL OBLIGATIONS AND ELECTRONIC DATA

As society's dependence on electronic communication increases, so does the need to manage this information effectively. From a legal standpoint, the reliance on email, instant messaging, electronic databases and files brings a whole new set of concerns, particularly around the issue of electronic evidence collection, preservation and admission into the courtroom. Businesses need to be aware of their legal obligations regarding these types of communications, especially when facing pending or imminent litigation.

Much of the concern lies with the nature of electronic communication itself. When a document is created using a computer, more information is generated than what appears on the screen. By design, electronic documents include other hidden, yet very useful information such as automatic date codes, identifications of the document creator as well as the name of the person who last viewed or made changes to the document. Such information is generally referred to as *metadata*.

Similarly, emails often include links to Web sites, attachments or additional information that goes well beyond the text of the message itself. Information, once deleted, may also still exist within the computer's memory and can often be retrieved. Original versions of documents – particularly when the creator uses a "track editing" function – can also be uncovered, revealing confidential and/or deleted details that were never intended to be disclosed. In addition, email and instant messaging are often done in a conversational, informal manner that can lead people – often your employees – to write things they might not otherwise include in more formal, written office communications.

How does this impact businesses from a legal perspective? In a lawsuit, the initial "discovery" process requires both parties to produce documents deemed relevant to the case. This is not limited to printed documents, but electronic communications as well. (*Continued, page 2*)

BASIC EMPLOYMENT LAW – THINGS YOU SHOULD KNOW

Whether managing your current business or establishing a new one, it makes good sense for business owners and managers to be familiar with basic employment law to avoid possible negative legal exposure.

▪ **Hiring an Independent Contractor**

When managing work flow, businesses often find themselves in need of extra help. This may mean deciding on whether to hire another new employee or temporarily seeking the help of an independent contractor (IC).

Why does it matter? (*Continued, Page 2*)

ELECTRONIC DATA (cont.)

Both counsel and client must take affirmative steps to preserve electronic information once litigation is threatened or filed. According to at least one court ruling, this means more than simply circulating an employee memo, but extends to taking definitive steps to insure appropriate measures are taken to preserve all potentially relevant forms of information, ranging from “on line,” to indirect to possibly deleted information.

When businesses find themselves facing pending or imminent litigation, Todd Picker, partner at Picker, Chow & Freisleben, recommends following a few simple guidelines to preserve and properly collect electronic information. Similar steps also must be conducted to avoid destruction of electronic information considered potentially pertinent to a case. See his tips below.

ELECTRONIC DATA TIPS

- 1. Utilize computer systems designed with redundancy and fault tolerance.**
- 2. Back up important data and keep a copy of such information off-site for security purposes.**
- 3. Employ tools that allows for the easy migration of data to separate media, such as disk drives, tape and off-site storage. By so doing such information can more easily be reviewed and retrieved in the event of litigation.**
- 4. Establish clear document retention policies applicable to both electronic data and physical paper information.**
- 5. When litigation is threatened, immediately involve counsel and internal IT personnel and take appropriate steps to preserve pertinent information.**

BASIC EMPLOYMENT LAW (cont.)

Employers are required to withhold a number of taxes for employees (federal payroll, social security, federal disability and federal income), but not for independent contractors. If the IRS decides to audit your business, you want to make sure your independent contractors have been documented correctly, or your company could be subject to possible back taxes and penalties.

Sharon Sung at the law firm of Picker, Chow & Freisleben, recommends taking the following steps when hiring independent contractors:

- During the initial interview with prospective ICs, determine their business structure (sole proprietorship, partnership, etc.) and whether they operate under a fictitious business name.

- Document the IC’s business address, phone number, employee headcount and the insurance and licenses carried; obtain a brief description of the IC’s business facility.
- Establish that the IC is a separate business entity. This can be ascertained by obtaining a copy of the IC’s fictitious business name statement, its professional licenses, or its general liability insurance.
- Keep this documentation on file for future reference.
- As a rule, do not ask an IC to complete an “employment” application, which can be used as evidence that an IC was actually an employee.

Family Medical Leave Act

The Family Medical Leave Act (FMLA), effective since 1993, applies to employers with 50 or more employees. This federal law entitles employees up to 12 weeks of unpaid leave for the birth of a child; placement of an adopted or foster child; to care for a child, spouse, or parent with a serious health concern; and for serious health conditions of the employee him/herself.

The FMLA requires affected employers to continue health benefits coverage for employees during their leaves of absence. After completion of the leave, the employee must be restored to the same or equivalent position in the company.

In California, employers may request medical certification from a healthcare professional to verify an employee’s need to take a leave. However, they are not at liberty to ask for the diagnosis, treatment, or other “medical facts” supporting an employee’s need for the specified leave.

Even with the benefits extended by the FMLA, there is NO LAW requiring an employer to offer paid vacation or sick leave to their employees. For those businesses that do, such policies should be applied consistently to all employees and employees should be asked to schedule their leaves in advance, particularly during holidays. This will help avoid subsequent claims of unfair treatment or partiality.

Founded in 2000 by partners of a multinational law firm, Picker, Chow & Freisleben specializes in commercial and civil trial litigation. Drawing on the collective large practice experience of its founding members, the firm provides clients high-level legal counsel and representation, yet with a personal hands-on approach that consistently delivers favorable results.

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